Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1999

ERIC K. NAKAMURA and RONALD N. SATO

Petitioners,

v.

BRUCE BABBITT, in his official capacity as
Secretary of the United States Department of the Interior,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CLAYTON C. IKEI
Counsel of Record
1100 Ward Avenue, Suite 1065
Honolulu, Hawaii 96814
(808) 533-3777-1617

Attorney for Petitioners

QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in affirming the trial court's dismissal of Plaintiff Sato's claim of discrimination following a Fed. R. Civ. Pro. Rule 43(e) evidentiary hearing.

2. Whether the Ninth Circuit erred in affirming the trial court's dismissal of Petitioner Nakamura's discrimination and retaliation claim filed in December 1993.

3. Whether the Ninth Circuit erred in affirming the trial court's decision to grant Defendant's Fed. R. Civ. Pro. Rule 50 Renewed Motion for Judgment as a Matter of Law.

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CITATIONS OF THE OFFICIAL REPORTS OF THE OPINIONS ENTERED IN THE CASE BY COURTS

The official citation of the Memorandum Opinion entered by the Ninth Circuit Court of Appeals of the instant case is 165 F.3d 916 (9th Cir., 1998)

CONCISE STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

This Court has jurisdiction to hear this case pursuant to 28 U.S.C.A. § 1254(1). The Order of the Ninth Circuit Denying Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc was filed on March 11, 1999. The Memorandum of the Ninth Circuit No. 97-17288; D.C. No. CV 95-00243-HG was filed on December 23, 1998. Notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

The statutes, regulatory and court rules pertinent to this appeal are: 42 U.S.C.A. § 2000e-16, 29 C.F.R. § 1614.105, 29 C.F.R. § 1614.504 and Rule 43(e) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

1. Petitioner Sato's Failure to Exhaust Administrative Remedies.

Ronald N. Sato ["Sato"], an American of Japanese ancestry, began employment in the Maintenance Division of Haleakala National Park ["Park"] in January 1978. His immediate supervisor was David Puu. Within a week after he became employed, Sato was the recipient of racial slurs from David Puu being called "fucking Jap, stupid Jap" at least three times a week during his employment, until he resigned in January 1992.

Sato reported these racial slurs to the Chief of Maintenance, Cliff McCall, and the Park Superintendent, Hugo Huntzinger. After he reported the racial harassment, it continued. In August 1982, Sato attended a National Park Service ["NPS"] conference in San Francisco. At the conference, he learned that Becky Mills was an EEO counselor, approached her and reported to her the racial slurs to which he was subjected. He was advised by Ms. Mills that "it was personal." Subsequently, in 1985, he attended an NPS conference at Hawaii Volcanoes National Park and complained
to Ms. Mills about his inability to secure a promotion or transfer as a result of Mr. Puu.

Ronald Sato, during the term of his employment with the NPS was not advised that the racial slurs of which he was the victim was racial discrimination, nor was he told that he could file a discrimination complaint as a result of the racial slurs. Lastly, Sato looked at the bulletin boards at the headquarters building at Haleakala

National Park for job and training postings. He did not observe any EEO posters on the bulletin boards. Sato sustained a back injury on the job in October 1991 which required him to remain home. On October 31, 1991; November 29, 1991; December 11, 1991 and December 27, 1991, he received telephone calls from David Puu and was again subjected to racial slurs. When Sato sought to present these facts at the Rule 43(e) hearing, the Court prohibited the testimony. Sato did not learn that he could file a discrimination complaint against David Puu until December 1993.

At the Rule 43(e) hearing conducted by the Court, Ms. Mills, when shown Mr. Sato's affidavit of April 5, 1996, testified that it was not possible for her to make such a statement. On cross-examination, Ms. Mills testified that she did not have a specific recollection of attending a conference in August 1982 or of what she told Sato at that conference.

As a result of the Rule 43(e) hearing, the trial court found Ms. Mills's testimony "to be highly credible and sincere" and found that "Sato was not correct in his recollection of his conversation with Ms. Mills as reflected in his affidavit and his testimony. . . ."

2. Dismissal of Nakamura's December 1993 Discrimination and Retaliation Complaint.

On November 18, 1993, Eric K. Nakamura ["Nakamura"] submitted a written informal complaint and sought counseling with a Park EEO Counselor concerning racial and sexual harassment of Park employees by David Puu and concerning the harassment he had

suffered in his efforts to raise his discrimination complaints against Mr. Puu and the Park management. Subsequently, on December 2, 1993, Nakamura filed another written informal complaint.

On February 14, 1994, Nakamura and Don Reeser, ["Reeser"] the Park Superintendent, entered into an Informal Resolution Agreement of Informal Discrimination by Eric K. Nakamura. The agreement required the Agency to reinstate Nakamura to 153 hours of annual leave; required Reeser to ensure that the 153 hours of annual leave be restored on or before March 20, 1994; provided that Nakamura would be returned to work on March 20, 1994, and finally, the Agency agreed that it would not take reprisal against Nakamura for the filing of his discrimination complaint.

On April 9, 1994, when he received his pay stub for the previous period, Nakamura received a pay statement that showed that his annual leave had not been restored. He notified Ron Nagata, the EEO counselor, who advised Nakamura that he would immediately check into it. In April 1994, Nakamura took sick and annual leave from work. On or about May 10, 1994, Nakamura received his leave and earnings statements and realized that he was being charged with 10 hours without pay, instead of the time being charged to annual leave. On May 22, 1994, he submitted a written statement to the National Park Service, through Melia Lane-Hamasaki, EEO Counselor, requesting that his informal complaint be reinstated on the basis that the NPS had not reinstated his 153 hours of annual leave, and that he was subjected to co-worker hostility which was known by Ron Nagata and Park Superintendent Reeser.

On May 31, 1994, Nakamura's counsel wrote a letter to Melia Lane-Hamasaki re-stating Nakamura's request that Nakamura's informal complaint be re-instated and amended to include co-worker retaliation. Nakamura's counsel requested that Lane-Hamasaki advise him as to Nakamura's attempt to reinstate his informal complaint. On June 4, 1994, Nakamura filed a formal complaint with the Agency, complaining of "Breachment of EEO Agreement," also of being a victim of retaliation because he was a whistleblower and because he exercised his First Amendment right to free speech. On June 6, 1994, Lane-Hamasaki acknowledged receipt of Nakamura's counsel's letter and advised that it had been forwarded via the Western Regional EEO Office in San Francisco to the NPS's Washington EEO office. Finally on June 6, 1994, Mary E. Kline, Lead EEO Counselor, Western Region, forwarded a letter to Nakamura acknowledging receipt of his request to Lane-Hamasaki that Nakamura's informal complaint be reinstated.

Ms. Kline acknowledged that Nakamura's annual leave had not been previously restored and that on June 3, 1994, she had been advised that it had been restored. Regarding Nakamura's claim of retaliation, Ms. Kline advised Nakamura that he needed to contact an EEO counselor and begin the informal complaint process. Ms. Kline did not address Nakamura's formal complaint filed on June 4, 1994, nor did she dismiss or otherwise act upon it.

On November 22, 1994, Nakamura's counsel wrote to the Director, Equal Employment Program, National Park Service and requested that the Agency issue an Immediate Agency Decision pursuant to 29 C.F.R. § 1614.110. On March 28, 1995, Nakamura's civil complaint was filed. On August 27, 1996, the Director of the

EEO Program of the Department of the Interior acknowledged receipt of Nakamura's June 4, 1994 formal complaint and dismissed it on the basis that a civil action had been filed.

3. Reconsideration and Dismissal as a Matter of Law of Nakamura's Wrongful Termination Claim.

Nakamura began his employment at Haleakala National Park as a seasonal employee in February 1989. For the years from 1989 to 1992, Nakamura worked as a seasonal employee receiving performance evaluations ranging from "satisfactory" to "exceeds fully successful." Finally, Nakamura received specialized training as a firefighter, helicopter safety employee, asbestos worker, and safe drinking water worker.

During the course of his employment, Nakamura became aware that the maintenance foreman, David Puu, was subjecting his subordinate employees to racial and sexual harassment. In early 1993, Nakamura informed Park Superintendent Reeser of the racial harassment that he had witnessed. When informed of this racial harassment committed by David Puu, Reeser laughed at Nakamura's complaint as unlikely, and said that he would check on the complaint and get back to Nakamura. After the initial complaint, when Nakamura brought further complaints to Reeser, Reeser would laugh at or criticize Nakamura's complaints.

On April 7, 1993, at a meeting arranged by his grandfather and aunt, Nakamura and 14 other maintenance workers met with Bryan Harry, Pacific Area Director of the National Park Service, and U.S. Representative Patsy Mink and voiced their complaints. As a result of

the meeting, an investigation team of NPS managers was established and conducted an investigation at Haleakala National Park from April 27 to April 30, 1993. As a result of the investigation, the National Park Service issued a report dated May 18, 1993; it recommended that David Puu be removed as a supervisor.

Eric Nakamura, both as a result of the investigation and the removal of David Puu as maintenance foreman, was retaliated against by David Puu and his supporters within the Maintenance Division. Such retaliation included refusals to provide Nakamura assistance to perform his maintenance duties, not doing Nakamura's assigned work on his days off, and the removal of necessary tools, keys and test kits from their usual storage places. On September 29, 1993, Nakamura applied for and received intermittent status owing to his becoming stressed because of his friction with his co-workers.

From September 1993 to March 1994, Nakamura was on intermittent status, leave without pay. On November 18, 1993, Nakamura submitted a written informal complaint and sought counseling with a Park EEO counselor concerning racial and sexual harassment of park employees by David Puu and the harassment he had suffered in his efforts to raise his discrimination complaints against Mr. Puu and the Park management. On December 2, 1993, Nakamura filed his written informal complaint. Pursuant to 29 C.F.R. § 1614.105, the Agency had 90 days from November 18, 1994 to resolve Nakamura's informal complaint. On February 14, 1994, Nakamura agreed to an Informal Resolution Agreement of Informal Discrimination Complaint.

On May 23, 1994, Nakamura, upon concluding that the National Park Service had not complied in terms of restoring 153 hours of annual leave and refraining from retaliating against him, requested that his Informal Complaint be reinstated and amended to include the charge that he had been subjected to co-worker retaliation since April, 1993. On May 26, 1994, as a result of an argument with Pete Lucero, Maintenance Division Supervisor, Nakamura requested leave, which was denied.

Nakamura sought and obtained psychological treatment from Dr. Richard Sword who recommended that Nakamura remain out of work for an undetermined period.

On September 9, 1994, Pete Lucero, forwarded a letter advising Nakamura, that owing to a lack of funding, he was being terminated. No attempt was made by Lucero to contact Nakamura prior to September 1994 to ascertain his ability and willingness to return to work.

On June 4, 1994, Nakamura filed a formal discrimination complaint. The basis of his complaint was breach of the informal resolution agreement of his informal discrimination complaint and retaliation as a result of his whistleblowing activities and exercise of his First Amendment rights to free speech. The Agency did not investigate Nakamura's formal complaint filed on June 4, 1994.

On November 22, 1994, Nakamura's counsel sent a letter to Sandra McCrary regarding the Nakamura's discrimination and retaliation complaint first initiated on November 18, 1993, detailing the procedural history of the complaint and referring to Mr.

Nakamura's subsequent formal discrimination and retaliation complaint filed on July 26, 1994. Nakamura's counsel requested that the two formal complaints be consolidated and that an Immediate Agency Decision be made pursuant to 29 C.F.R. § 1614.110. The Agency did not respond to Nakamura's counsel's request. The District Court Complaint was filed on March 28, 1995. On August 27, 1996, the Director of the Office of Equal Opportunity of the Department of Interior, wrote to Nakamura's counsel and referred to Nakamura's formal complaint filed on June 4, 1994. Noting that a civil action had been filed, the Director of the Office of Equal Opportunity of the Department of the Interior dismissed Nakamura's formal complaint on the basis that a court action had been filed, pursuant to 29 C.F.R. § 1614.107(c).

On February 12, 1996, the Defendant filed a Motion for Summary Judgment seeking to dismiss Nakamura's complaint. On September 10, 1996, the trial court denied the Motion; the court's order did not address the issue of Petitioner Nakamura's wrongful termination claim. On December 12, 1996, the Defendant filed a further motion raising the issue of Petitioner Nakamura's wrongful termination claim. On February 20, 1997, the trial court denied the

Defendant's motion to dismiss Nakamura's wrongful termination claim on failure to exhaust administrative remedies.

At trial, the Petitioner presented evidence establishing the retaliatory motives of both Don Reeser and Pete Lucero. A three-page stipulation, prepared by Defendant's counsel, and approved by the Court, was submitted in lieu of testimony relating to testimony detailing the substance of the EEO complaints first made by the

Petitioner in April 1993 and contained in his subsequent informal EEO complaint. The stipulation provided that the findings of the National Park Service was critical of Haleakala National Park's management, headed by Superintendent Reeser, and recommended that personnel changes be made by Don Reeser. Don Reeser himself testified that he was embarrassed by the findings of the fact- finding team in that it recommended the removal of his maintenance foreman, upon whom he had depended heavily and who he had defended before the fact-finding committee. Don Reeser further testified he was stressed by the investigation and findings of the fact-finding team. When queried as to whether he believed that Nakamura was directly responsible for the fact-finding committee being established and tasked to inspect the Park, Don Reeser stated an unequivocal yes response and volunteered that it was Nakamura, and "his political contacts" which caused the inspection.

Pete Lucero further testified that he became aware of the NPS inspection of April 1993, when he read the findings in October 1993. The findings had been collected and placed in a notebook in his desk. Testimony was presented that Pete Lucero had terminated a maintenance employee named Billy Han, after Mr. Han had filed an EEO complaint against Lucero, that Lucerno had verbally abused a secretary after the secretary advised Billy Han of his right to file an EEO complaint, that Lucero had reprimanded Wendall Sagon, when Mr. Sagon reported that another maintenance worker and a foreman were engaged in smoking marijuana while working, and had warned Wendall Sagon that if he spoke on a radio show about the problems at Haleakala Park, he would be a "labeled" man and would not get ahead in the park service.

Reeser testified that he reviewed closely the February 1994 settlement agreement into which he entered with Nakamura and he testified that he noted that Nakamura's continued employment with the National Park Service after September 1994 was dependent on sufficient funding being available to offer Nakamura employment after that date. Reeser further testified that he reduced the budget of the Maintenance Division by $50,000 as a result of the retirement of David Puu despite his admission that he had not received any written verification from his superiors that his overall funding would be reduced by $50,000. Mr. Reeser further testified that he permitted Lucero to keep two temporary maintenance workers on the job, after their proposed termination dates. Mr. Reeser did not receive written verification that their funding was not taken away by his superiors until December 1994, months after their funding was expected to cease.

Pete Lucero testified that James Korn, a temporary maintenance employee, who was continued in his employment with the National Park Service, had been suspended in July 1994 for drug use while at the Park. Mr. Korn was one of the temporary employees retained. Elizabeth Havelin, the second employee retained by the National Park Service, did not have the specialized training in welding, sign making, or power tools as did Eric Nakamura and further, had never received a performance rating of "exceeds fully successful." Pete Lucero testified that Eric Nakamura's work performance was satisfactory during the period of his employment.

In rebuttal, Nakamura presented the testimony of Audrey Cordeiro who testified that she has been employed at the Park for 23 years and that in 1993-1994, she worked as the Administrative Assistant with duties of "taking care" of the budget, finances,

personnel, property — all the administrative functions at Haleakala Park. Regarding her work on the budget, Ms. Cordeiro further testified that each division within the Park had control of its allocated budget, with overall control exercised by Don Reeser. Further, Ms. Cordeiro testified that at times, monies were shifted from one division's budget to another division's budget. Lastly, Ms. Cordeiro testified that the manpower level within the Maintenance Division was presently the same as it was in 1994.

In its verdict, the jury found that the Defendant terminated Nakamura because he complained about alleged discrimination and awarded Nakamura compensatory damages in the amount of $30,000.

REASONS RELIED ON
FOR ALLOWANCE OF THE WRIT

1. Validity of Rule 43(e) Hearing to Dismiss Sato's Claim

The court of appeals and the trial court relied upon the case of *Ritza v. International Longshoremen's andWarehousemen's Union*, 837 F.2d 365 (9th Cir., 1988) to sustain the dismissal of Sato's claim. However, the *Ritza* holding is clearly distinguished from the instant case. The *Ritza* plaintiffs' claims were dismissed without prejudice based on their failure to utilize the union's grievance procedure before filing their court action. The *Ritza* plaintiffs did not deny that they were aware of the union's grievance procedure; they argued that they did not proceed in the grievance procedure because the decision makers were hostile, that there was unreasonable delay in processing the grievance and that the remedy was inadequate.

However, Petitioner's cited cases held that the Rule 43(e) hearing was improper to resolve disputed issues of facts as to the timeliness of a discrimination complaint. *Spivey v. U.S.*, 912 F.2d 80 (4th Cir., 1990) and *Stewart v. RCA Corp.*, 790 F.2d 624 (7th Cir., 1986). That summary judgment on the issue of exhaustion of administrative remedies is reversible error in a case in which there are disputed issues of fact relative to the Petitioner's knowledge of his right to file a discrimination complaint and the applicable time limits prior to December 1993, was aptly illustrated by the holding in *Bayer v. United States Department of Treasury*, 956 F.2d 330 (D.C. Cir., 1992).

Further, in *Stewart* the Seventh Circuit Court of Appeals held that the trial court committed error by conducting a pre-trial hearing at which the trial court received oral testimony and ruled that the Plaintiff's discrimination complaint was not timely filed. The Rule 43(e) hearing was preceded by a written order by the trial court stating that a Rule 43(e) hearing would be held at which the Plaintiff's counsel appeared and participated. Nevertheless, the Appeals Court stated:

> The district judge stated that under Rule 43(e) the court may "receive and weigh" oral and written evidence, quoting and adding emphasis to *Shaffer v. Coty, Inc.*, 183 F. Supp. 662, 665 (S. D. Cal. 1960). If this were right, it would be the end of the difference between summary judgment and trial; indeed it would be the end of the jury trial. All a judge would have to do is identify a dispositive issue, set a hearing under Rule 43(e), and resolve all factual disputes. This is not right. Rule 43(e) has more limited roles, which do not include hearings of the sort held in this case.
>
> * * * *
>
> A court may choose among methods for gathering the evidence, when it will resolve all factual disputes. Rule 43(e) gives the judge the full menu — oral testimony, depositions, affidavits, and documents... The power to select among kinds of evidence does not

> imply a power to resolve disputed questions of fact. That power must be found outside Rule 43(e).

790 F.2d 624 at 628.

Thus, Ninth Circuit's reliance on *Ritza* conflicts with the holdings of *Spivey*, *Bayer* and *Stewart*.

2. Dismissal of Nakamura 1993 Claim of Unlawful Retaliation.

The Ninth Circuit affirmed the trial court's holding that Nakamura failed to exhaust his administrative remedies by failing to comply with 29 C.F.R. §1614.504.

However in *Saksenasingh v. Secretary of Educ.*, 126 F.3d 347 (C.A.D.C., 1997), the D.C. Circuit held:

> The judgment of the District Court on exhaustion was in error. The statute which these regulations interpret, 42 U.S.C. § 2000e-16(c), permits, but does not require, appeal to the EEOC, and has been so understood by this court. We have held that under 42 U.S.C. § 2000e-16(c), a complainant may either file suit after the appropriate number of days has elapsed since complaining to the agency, or "elect[ ] instead to appeal the agency's decision to the EEOC." Likewise, the court has explained that Title VII requires a complainant to file "an initial charge with

> the employing agency. Upon exhaustion of the administrative proceedings, a complainant is entitled to trial *de novo.*" This description neither mentions nor envisions required appeal to the EEOC.

126 F.3d 347 at 350 to 351.

Therefore, there is a conflict between the Ninth Circuit's decision and *Saksenasingh* and 29 C.F.R. § 1614.504.

3. Dismissal of Nakamura's Claim of Retaliatory Termination.

The court of appeals' affirmation of the trial court's dismissal of Nakamura's retaliatory termination claim not only reversed its own prior order denying dismissal of the retaliatory termination claim, but also was contrary to the Ninth Circuit's holding in *Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir., 1990). The Appellant Panel also did not address Nakamura's argument that the trial court's prior ruling was "law of the case" which barred the district court from reconsidering ruling for defendant on the same issue, post trial.

In addition, under *Williams v. Runyon*, 130 F.3d 568 (3rd Cir., 1997) the Third Circuit held that if it construed a pre-trial order as a judgment as a matter of law as opposed to a ruling that material facts were still in dispute, the district court's post-trial reconsideration of that decision is barred by the "law of the case" doctrine.

Acknowledging that the application of the doctrine of "law of the case" is discretionary, the Third Circuit stated:

> Although it is often said that the law of the case doctrine does not limit the power of trial judges to reconsider their prior decisions, this court has identified two prudential considerations that limit a court's authority to do so.
>
> * * * *
>
> Although the district court satisfied the first element of this test, we hold that the court did not satisfy the second element. Williams was clearly prejudiced by her reliance on the prior ruling: she put on her case at trial, and was awarded a favorable verdict, without presenting any evidence that she had in fact exhausted her administrative remedies. Had the court expressed its second thoughts about its earlier ruling prior to the end of Williams' case, Williams would have had the opportunity to present appropriate evidence to the jury. By revisiting the issue *after* trial *on the same record* that was before it earlier, however, the court denied Williams this opportunity. Because the district court, by its earlier ruling and expression, did not alert Williams to its concern about exhaustion, Williams was undeniably prejudiced. Recognizing the district court's earlier ruling and its reasoning in reaching the conclusion that it would forego reliance on exhaustion and reach the merits of Williams' claims, it was error

> to have reconsidered the issue after the jury verdict was returned. *See United States v. Mendel,* 746 F.2d 155, 161 (2d Cir.1984) (holding that prejudice would result if counsel were not given the opportunity to offer new evidence at trial following a reconsideration by the court of an earlier ruling).

130 F.3d 568 at 573

Therefore, the Ninth Circuit erred by not adhering to its own opinion under *Sosa*, and is in conflict with *Williams*.

4. Trial Court Vacating the Jury Verdict and Entering Judgment as a Matter of Law.

In *Cockrum v. Whitney*, 479 F.2d 84 (9th Cir., 1973), the Ninth Circuit held that it was improper for a trial court to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because the judge felt that other results are more reasonable. In its Order Granting Defendant's Renewed Rule 50 Motion for Judgment as a Matter of Law, the trial court pointed to Nakamura's reference to Don Reeser's testimony that it was Nakamura's political "connections" (instead of "contacts" as referenced in the trial transcript) and Don Reeser's demeanor at trial, stating that Reeser "was not equivocal" answered in a "straightforward and consistent manner," and that:

> Reeser's testimony regarding the fact that the NPS investigation caused him stress and his acknowledgment that Petitioner played a key role in

initiating that investigation are insufficient, without more, to support a reasonable finding of retaliatory intent in Plaintiff's termination by a separate individual approximately a year and a half later.

Nakamura would submit that a reasonable juror can infer a retaliatory intent when Nakamura proved the first two elements of unlawful retaliation, in that he not only played a key role in initiating an NPS investigation in April 1993, but moreover proved that:

1. He filed a discrimination complaint against Donald Reeser in November 1993;

2. That Donald Reeser entered into a settlement agreement with Nakamura in February 1994;

3. That Donald Reeser did not comply with the terms of the settlement agreement of restoring his annual leave before the agreed-upon date of March 20, 1994.

In addition to presenting evidence of other acts of retaliatory conduct by Pete Lucero against other employees who filed EEO complaints, Nakamura further proved that the articulated reasons for Nakamura's termination were pretextual — that the justification for Nakamura's termination in September 1994 was that Haleakala Park's budget was reduced by $50,000 as a result of the retirement of David Puu. However, the Defendant failed to produce any documentary evidence that established that Haleakala Park's budget was, in fact, reduced by $50,000.

Further, the sequence of events as presented by the Defendant could reasonably cause a reasonable juror to reject the articulated reason for Nakamura's termination, and find that the termination was based on retaliatory animus. The events were as follows:

1. Pre-September 1994 — no verification that Haleakala's Park budget was reduced by $50,000;

2. September 1994 — Nakamura terminated; the stated reason for the termination being a lack of funding;

3. October 1994 — no verification that budget was reduced or affected by Puu's retirement;

4. October 17, 1994 — James Korn and Elizabeth Havelin given termination notices, effective date, November 12, 1994;

5. November 1994 — No verification that Haleakala's Park budget was reduced or affected by Puu's retirement;

6. November 13, 1994 — James Korn and Elizabeth Havelin remain on the job despite the termination notices of October 17, 1994;

7. December 23, 1994 — e-mail to Haleakala Park that its budget was not affected by Puu's retirement.

The trial court relied on *Fisher v. Vassar College*, 114 F.3d 1332 (2nd Cir. 1997) and *St. Mary's Honor Center v. Hicks*, 509 U.S.

502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) when it determined that Nakamura failed to present specific, substantial evidence that Defendant did not terminate him because of budgetary reasons, and that Defendant terminated Nakamura in retaliation for his EEO activities.

However, the Sixth Circuit has interpreted the *Hicks* decision such that once a plaintiff has disproved the reasons offered by the defendant, the factfinder is permitted to infer discrimination. The plaintiff's *prima facie* case, along with disbelief of the employer's proffered reasons permits finding of discrimination. *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997); *Hicks*, 509 U.S. at 511.

Similarly in *Sheridan v. E.I. duPont de Nemours and Co.*, 100 F.3d 1061 (3rd Cir. 1996)(en banc), the Third Circuit held that plaintiff may survive summary judgment or judgment as a matter of law ("JAML") in an employment discrimination complaint if plaintiff produces sufficient evidence to raise genuine issue of fact as to whether employer's proffered reason were not the true reasons for the challenged action. The court in *Sheridan* interpreted *Hicks* to hold that once a plaintiff establishes a *prima facie* case, disbelief of the defendant's proffered reasons creates a situation where the fact-finder is permitted to infer intentional discrimination. *Id.* at 1066-1067.

Moreover, the court in *Sheridan* expressly rejected the requirement of the introduction of additional evidence following a rejection of the defendant's alleged reasons for the adverse action. *Id.*

Therefore, there is a conflict among the Circuits as to the proper standard in finding of pretext in a JAML situation that this Court should resolve.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

CLAYTON C. IKEI
Hawaii Bar No. 1260-0
Counsel of Record
Attorney for Petitioners

APPENDIX

ERIC K. NAKAMURA, et al., Plaintiff,

v.

BRUCE BABBITT, in his official capacity as Secretary of the United States Department of the Interior, Defendant.

Civ. No. 95-00243 HG

Appeal from the United States District Court
for the District of Hawaii
Helen Gillmor, District Judge, Presiding

Argued and Submitted, November 6, 1998
Honolulu, Hawaii

Before: GOODWIN, BEEZER and T.G. NELSON, Circuit Judges.

MEMORANDUM*

Ronald Sato and Eric Nakamura appeal the dismissal of their complaint alleging racial discrimination and retaliation. Sato appeals the dismissal of his complaint for failure to exhaust administrative remedies. Nakamura appeals the dismissal of his 1993 retaliation

*This disposition is not appropriate for publication and may not be cited to or used by the courts of the circuit except as provided by Ninth Circuit Rule 36-3.

claims and his wrongful termination claim for failure to exhaust administrative remedies, the grant of judgment as a matter of law as to his wrongful termination claim, and the exclusion of evidence regarding his protected activities. We have jurisdiction and we affirm.

I

We review a dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b) (6) de novo. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). The district court properly held a Rule 43(e) evidentiary hearing to determine whether the time limit on Sato's administrative discrimination complaint should be equitably tolled.

> Nonenumerated Rule 12(b) motions are governed by the general motion provisions in the federal rules, including Rule 43(e), which permits the hearing of motions based on facts outside the record....

Ritza v. International Longshoremen's and Warehousemen's Union, 837 F.2d 365, 369 (9th Cir. 1998) (citations and internal quotation marks omitted). Sato was not automatically entitled to a jury trial on this issue. *See Id.* at 369 (no right of jury trial for a jurisdictional or related type of motion). We agree with the district court that Sato's claim should not be tolled because he had not been misled by EEO officals and had been given official notice of the time limit. We affirm the district court's dismissal of Sato's claim for failure to exhaust administrative remedies in a timely manner.

II

The district court correctly found that the Informal Resolution Agreement between Nakamura and the Park Service barred Nakamura's pursuit of his 1993 informal discrimination and retaliation claims. We review a grant of summary judgment de novo. *See Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). Although Nakamura is correct that under the Agreement he was entitled to have his complaint reinstated, he did not comply with the terms of the agreement and provide notice of noncompliance within 30 days. Additionally, the Park Service's breach was not material because the Park Service corrected its error within a short time of notification. We affirm the district court's grant of summary judgment.

III

The district court granted the government's Rule 12(h) (3) post-judgment motion dismissing Nakamura's 1993 retaliatory termination claims for lack of subject matter jurisdiction because Nakamura filed to present this claim to the National Park Service. The existence of subject matter jurisdiction is a question of law that we review de novo. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1153 (9th Cir. 1998). The district court denied summary judgment on Nakamura's retaliatory termination claims prior to trial due to the complex factual situation. By the conclusion of the trial, it was apparent that Nakamura had failed to claim retaliatory termination despite filing an EEO complaint after his termination and that an EEO investigation would not have reasonably included termination within

its scope. We affirm the district court's dismissal for lack of subject matter jurisdiction.

IV

We review a judgment as a matter of law de novo. *See Lawason v. Umatilla County*, 139 F.3d 690, 692 (9th Cir. 1998). Such a judgment is proper when the evidence, construed in a light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that reached by the jury. *See Id.; Forrett v. Richardson*, 112 F.3d 416, 419 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1366 (1998). At trial Nakamura established a prima facie case of retaliation. The government presented evidence that Nakamura was terminated for budgetary reasons — a legitimate, nondiscriminatory reason. Nakamura did not meet his burden of producing specific evidence of pretext to prove that the government's budgetary reason for the termination was false. We affirm the judgment as a matter of law.

V

Nakamura sought to introduce testimony that would describe other employees' personal knowledge of discrimination and retaliation by co-workers. We review a trial court's decision to exclude evidence for abuse of discretion. *See United States v. Hernandez*, 109 F.3d 1450, 1452 (9th Cir. 1997). The district court ordered the parties to produce a stipulation that provided the jury with conclusive evidence that Nakamura had been previously involved in Title VII protected activity and that laid a sufficient basis for Nakamura's retaliation

claims. Additionally, the court considered the testimony of each potential witness with counsel to determine the relevancy of the

testimony to Nakamura's present allegations. The district court did not abuse its discretion by ordering the stipulation.

AFFIRMED.

ERIC K. NAKAMURA, et al., Plaintiff,

v.

BRUCE BABBITT, in his official capacity as Secretary of the United States Department of the Interior, Defendant.

Civ. No. 95-00243-HG

United States District Court,
District of Hawaii

September 19, 1996

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

GILMOR, District Judge.

On March 28, 1995, Plaintiffs Eric K. Nakamura ("Nakamura"), Ronald N. Sato ("Sato"), and David A. Texeira ("Texeira") filed a complaint against Defendant Bruce Babbitt, in his official capacity as Secretary of the United States Department of the Interior ("Defendant"). Plaintiffs are former employees of the Maintenance Division of Haleakala National Park (the "Park"), and allege that various Park employees discriminated against them in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*

On February 12, 1996, Defendant filed a motion for summary judgment dismissing the Title VII claims asserted by Plaintiffs Nakamura, Sato and Texeira. This motion came on for hearing on May 6, 1996, with Clayton C. Ikei and Sherell N. McFarlane appearing on behalf of Plaintiffs Nakamura, Sato and Texeira, and Assistant U.S. Attorney R. Michael Burke appearing on behalf of Defendant. Plaintiff Texeira has since stipulated to a dismissal of his claims against Defendant. See Stipulation for Dismissal with Prejudice Claim of David A. Texeira, filed July 8, 1996. Accordingly, this order only addresses Defendant's motion for summary judgment as it relates to the outstanding Title VII claims asserted by Plaintiffs Nakamura and Sato (collectively referred to as "Plaintiffs"). For the reasons set forth below, the Court DENIES the motion of Defendant for summary judgment dismissing Plaintiffs, claims.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv.*,

Inc. v. Pacific Elec.Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The movant need not advance affidavits or similar materials to negate the existence of an issue on which the opposing party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323.

If the moving party meets its burden, then the opposing party must come forward with "specific facts showing that there is a genuine issue for trial" in order to defeat the motion. Fed. R. Civ. P. 56(e); *T. W. Elec.*, 809 F.2d at 630. The opposing party cannot stand on the pleadings nor simply assert that it will discredit the movant's evidence at trial. *Id.* "If the factual context makes the [opposing] party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Cal. Arch. Bldg. Prods. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)), *cert. denied* 484 U.S. 1006 (1988).

The standard for summary judgment reflects the standard governing a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). When there is a genuine issue of material fact, "the judge must assume the truth of the evidence set forth by the [opposing] party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Inferences from the facts must be drawn in the light most favorable to the non moving party. *Id.*

DISCUSSION

Defendant moves for summary judgment dismissing the Title VII claims of Plaintiffs Nakamura and Sato. Defendant contends that Plaintiffs' suit is subject to summary judgment because their Title VII discrimination claims: (1) were untimely, having not been brought to the Park's attention as required by law; and/or (2) have been fully compromised; and/or (3) state a claim for which no relief can be granted. Defendant's Memorandum in Support at 1. The Court disagrees.

I. Plaintiff Nakamura's Title VII Retaliation Claims

A. Background

Plaintiff Nakamura's Title VII claim is premised on a chronology of events which date back to April 1993. The Complaint asserts that Plaintiff Nakamura was subjected to a hostile work environment from May 1993 until September 30, 1993, when he took a temporary leave of absence from his seasonal maintenance employment, in retaliation for instigating an April 1993 NPS investigation into allegations of racial harassment and

discrimination by Park Supervisor David Puu. Plaintiff Nakamura and the Park eventually resolved this matter by way of Informal Resolution Agreements dated February 14, 1994 and April 11, 1994.

Plaintiff Nakamura also asserts that he endured retaliation upon his return to work on March 20, 1994, which culminated in his termination on September 30, 1994. In one instance, this alleged

retaliation surfaced in connection with Plaintiff Nakamura's leave during the May 22-26, 1994 period. In a letter to Equal Employment Opportunity ("EEO") Counselor Ronald Nagata dated June 27, 1994, Plaintiff Nakamura recounted that, on May 22, 1994, his immediate supervisor Doug Buttery granted his request to take "stress leave" for the remainder of the day, and through May 25, 1994, but on May 23, 1994, Maintenance Supervisor Peter Lucero informed him that any "annual leave" would not be approved. Exhibit E to Declaration of Donald W. Reeser in support of Defendant's Motion for Summary Judgment, filed February 12, 1996 ("Reeser Decl.") at 67-69. With respect to May 26, 1994, Plaintiff Nakamura recounted that he had submitted a leave slip for leave without pay to Acting Superintendent Bob Butterfield, and that Butterfield verbally authorized him to leave, but that Lucero later charged him with being absent without leave ("AWOL"). *Id.* Plaintiff Nakamura explained in the letter that his leave was necessitated by stress linked to "the hardship" created by the Park Service, and specifically referenced the Park's "breachment of my agreement."

B. Analysis: Title VII Retaliation Claim Regarding May 22-26, 1994 Leave

1. No Issue of Settlement Bar or Administrative Exhaustion

On Defendant' s motion for summary judgment, the Court need not address (1) whether, and to what extent, the administrative exhaustion requirements set forth in 29 C.F.R. § 1614, *et seq.*, preclude adjudication of Plaintiff Nakamura's Title VII claims, nor (2) whether, and to what extent, the Informal Resolution Agreements dated

February 14, 1994 and April 11, 1994 bar Plaintiff Nakamura from recovering for allegations of pre-April 11, 1994 retaliatory acts. At least one element of Plaintiff's Title VII claim was administratively exhausted in a timely manner and was not resolved by any agreement.

Plaintiff Nakamura's Title VII claim includes an allegation of post-April 11, 1994 retaliation in connection with his May 22-26, 1994 leave (the "Leave Incident"). Defendant does not dispute that Plaintiff Nakamura timely exhausted his administrative remedies with respect to the Leave Incident. *See* Defendant's Memorandum in Support at 1, 18. Indeed, through his June 27, 1993 letter to EEO Counselor Ron Nagata, Plaintiff Nakamura clearly initiated contact with an EEO counselor regarding the Leave Incident within 45 days of its May 22-26, 1994 occurrence, as required by 29 C.F.R. § 1614.105(a). Plaintiff Nakamura also participated in EEO Counseling with respect to the alleged retaliatory Leave Incident. *See* Exhibit E to Reeser Decl. at 31-48. On July 20, 1994, EEO Counselor Ron Nagata issued a Notice of Final Interview and Right to File a Discrimination Complaint regarding the Leave Incident.

2. Prima Facie Elements of Retaliation Claim Satisfied

Defendant contends that the Title VII claim regarding the Leave Incident is subject to dismissal because Plaintiff Nakamura has failed to establish his prima facie case for a retaliation claim.

A showing of three elements is required in order to make out a prima facie case of retaliation: (1) the plaintiff engaged in activity protected by Title VII; (2) an adverse employment action occurred; and

(3) there was a causal connection between the participation in the protected activity and the adverse employment action. *See Wallis v. Simplot*, 26 F.3d 885, 891 (9th Cir. 1994).

Defendant does not dispute here that Plaintiff Nakamura engaged in "protected activity" within the meaning of Title VII. To be sure, such activity can be found in Plaintiff Nakamura's participation in the NPS Investigation and his prior filing of a informal EEO complaint which was settled by the Informal Resolution Agreements. Defendant, however, takes issue with the second and third requirements as they relate to Plaintiff Nakamura's Leave Incident claim. Defendant's Memorandum in Support at 20 and n.7. The Court finds that such requirements have been fulfilled.

a. Adverse Employment Action

Defendant asserts that the Leave Incident did not involve an "adverse employment action" within the meaning of Title VII because the Park eventually granted Plaintiff Nakamura "sick leave" for his May 22-25, 1994 absence, as he originally requested. Plaintiff Nakamura, however, is not limited to complaining about the type of leave that was eventually granted for his May 22-25, 1994 absence. Defendant may be liable for Plaintiff Nakamura's need to take leave itself, if the leave was in fact necessitated by a retaliatory hostile work environment, as Plaintiff Nakamura asserts. A hostile work environment, as opposed to mere ostracism, may constitute an "adverse employment action." *See Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 869 (9th Cir. 1996) (citing *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842, 856 (1989)).

Additionally, the issue of Plaintiff Nakamura's AWOL status on May 26, 1994 remains unresolved. A decision to deny an employee leave is an "adverse employment action," regardless of the length of requested leave. *See Page v. Volger*, 645 F.2d 227, 233 (4th Cir.) (en banc), *cert. denied*, 454 U.S. 892 (1981). Equally significant, if Plaintiff Nakamura is correct that he was actually granted leave without pay on May 26, 1994, the AWOL mark on his employment record alone rises to the leave of an "adverse employment action" within the meaning of Title VII. *See Id.*

b. Causal Connection

Defendant also contends that there can be no factual basis for Mr. Nakamura's allegation in the pleadings that the work absence dispute was causally connected to the protected activity. Defendant's Memorandum in Support at 20. The Court finds that Plaintiff Nakamura has proffered sufficient evidence of a causal connection to satisfy his prima facie burden. A causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Burrus v. United Tel. Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982); see also *Knickerbocker v. City of Stockton*, 81 F.3d 907, 912 (9th Cir. 1996) (citing *Burrus*). In the instant case, the events surrounding the Leave Incident occurred within one year of Plaintiff's protected activities. In addition, Plaintiff Nakamura stated in his affidavit that, after the NPS Investigation, there was ongoing friction between himself and many of his Park coworkers, who were friends with Puu. Nakamura Aff. at ¶18. Defendant has not proffered any evidence suggesting that Plaintiff Nakamura's May 22-25, 1994 sick leave was wholly unrelated to the

alleged hostile work environment, and has not provided a legitimate, non-retaliatory reason for Plaintiff's AWOL status on May 26, 1994.

The Court concludes that Plaintiff Nakamura has presented sufficient evidence to support a finding that the alleged retaliatory Leave Incident was causally connected to his protected activities. Plaintiff Nakamura has satisfied his prima facie burden for his Title VII retaliation claim, insofar as it relates to the Leave Incident. Accordingly, the Court DENIES the motion of Defendant for summary judgment dismissing Plaintiff Nakamura's Title VII claim in the entirety.

II. Plaintiff Sato

A. Background

Plaintiff Sato asserts Title VII claims against Defendant for racial harassment and racial discrimination by Park Supervisor Puu. During the thirteen-year period between January 1978 and January 1992, Plaintiff Sato was employed as a full-time, permanent maintenance worker in the Park Maintenance Division under the supervision of Park Supervisor Puu. Affidavit of Ronald Sato in support of Plaintiffs' Concise Statement filed April 18, 1996 ("Sato Aff.") at ¶ 2. Plaintiff Sato asserts that, throughout this period, Park Supervisor Puu racially harassed him at least three times a week by referring to him in a racially derogatory manner. *Id.* at ¶¶ 3, 4. Plaintiff Sato further contends that Puu assigned him to permanent sanitation duties — cleaning toilets, working with raw sewage, cleaning windows and waxing floors — on account of his Japanese ancestry, and that Puu

gave him negative job referrals when he sought transfers to other departments within the Park, or to other national parks. *Id.* at ¶ 6.

B. Analysis

Defendant contends that Plaintiff Sato's Title VII claim for racial harassment and discrimination should be dismissed in their entirety because (1) he failed to satisfy the administrative exhaustion requirement set forth at 29 C.F.R. § 1613.214(a)(1)(i) ("Section 1613.214 (a) (1) (i)") , Defendant's Memorandum in Support at 13-14, and (2) Defendant took appropriate remedial measures after learning of Plaintiff Sato's allegations. *Id.* at 22-25. The Court disagrees.

1. Section 1613.214(a)(1)(i)

Where, as here, the alleged discriminatory events occurred prior to October 1, 1992, Section 1613.214 (a) (1) (i) required Plaintiff Sato to bring the alleged discriminatory matter to the attention of an EEO counselor within 30 days of its event. 29 C.F.R. § 1613.214(a)(1)(i). Contrary to Defendant's assertions, this regulation did not require Plaintiff Sato to file a written and signed informal EEO complaint with the EEO office within the 30 days, but only to bring the matter "to the attention" of an EEO counselor within the time limitation. *Richardson v. Frank*, 975 F.2d 1433, 1436 (10th Cir. 1992).

Plaintiff Sato states in his affidavit that:

> In the mid to late 1980s, I met Becky Mills at two orientations in . . . California and found that she was an Equal Employment Officer for the western Region

> office. I told her that my supervisor, Mr. Puu, was calling me "one stupid Jap" and "fucking Jap' [sic] on a regular basis. I also told her that since I had started at Haleakala in 1978 I have only been assigned to sanitation duties despite the fact that I am qualified to do other work such as carpentry and masonry. Ms. Mills responded that my situation was personal. She did not inform me that I had the right to file an equal employment opportunity complaint or any other complaint for that matter . . . .
>
> On October 22, 1985 I spoke to Ms. Mills while attending a women's conference on the Island of Hawaii. I informed her that Mr. Puu was hindering my transfer to other departments or national parks by putting "I cannot judge" in the supervisor's section of my application, and would just assign me sanitation duties. She simply replied that it was "up to my supervisor, that he has to rate how good you are;" she did not inform me that I could file any complaints.

Sato Aff. at 11 9-10. There are genuine issues of material fact as to whether these contacts with EEO Officer Mills were notification of the kind intended to satisfy Section 1613.214(a)(1)(i).

If Plaintiff Sato's discussions with EEO Officer Mills served to bring at least one incident of alleged racial harassment "to her attention" within the 30-day deadline imposed by Section 1613.214 (a) (1) (i) , the continuing violations doctrine may apply to bring all incidents of alleged racial harassment, reaching back to January 1978,

within this regulation. In the instant case, the frequency of racial harassment alleged by Plaintiff Sato certainly suggests a continuing violation, that is, a series of separate acts of racial harassment emanating from the same animus and amounting to a hostile work environment. See *Waltman v. International Paper Co.*, 875 F. 2d 468, 476 (5th Cir. 1989) . Under the "continuing violations" doctrine, if one or more of the acts constituting the continuing violation is "brought to the attention" of an EEO counselor within the 30-day statutory deadline set by Section 1613.214 (a) (1) (i) , all acts constituting the "continuing violation" are brought within this administrative regulation, and may be considered. *Id.; see also Green v. Los Angeles County Superintendent of Sch.*, 883 F.2d 1472, 1480 (9th Cir. 1989).

Accordingly, the Court finds that there are genuine issues as to whether Plaintiff Sato has satisfied the administrative requirement set forth in Section 1613.214 (a) (1) (i) with respect to his Title VII claim of racial harassment and discrimination. While Defendant makes much of the fact Plaintiff Sato was a member of the Park's informal EEO committee in 1988, Defendant's Mem. Supp. 13, such participation did not heighten Section 1613.214 (a) (1) (i) , s notice requirements as to Plaintiff Sato, nor did it strip him of the continuing violations doctrine.

2. Remedial Obligations

Under Title VII, an employer is liable for a hostile work environment only if the employer failed to take adequate remedial or disciplinary action after the employer knew or should have known of

the conduct generating the hostile work environment. *Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995). Defendant contends that Plaintiff Sato's racial harassment and discrimination claim should be dismissed because the Park promptly took remedial action after learning of such allegations. Defendant relies on the remedial steps taken by Park Superintendent Donald Reeser during and after April 1993. Defendant's Memorandum in Support at 22-25. That is, Defendant proceeds on the basis that his remedial obligation did not commence until April 1993.

There is evidence suggesting that Plaintiff Sato informed the Park management in the mid to late 1980's [sic], if not earlier, that Park Supervisor Puu was racially harassing and discriminating against him. *See* Sato Aff. at ¶¶ 7-10. Such evidence therefore raises questions as to whether the Park's remedial obligations commenced well before April 1993, and if so, whether Reeser's remedial action in April 1993 absolves Defendant from Title VII liability.

In light of the above, the Court DENIES the motion of Defendant for summary judgment dismissing Plaintiff Sato's Title VII claim for racial harassment and discrimination.

CONCLUSION

In accordance with the foregoing, it is HEREBY ORDERED that:

1 . The motion of Defendant Babbitt for summary judgment dismissing Plaintiff Nakamura's Title VII claim is DENIED.

2 . The motion of Defendant Babbitt for summary judgment dismissing Plaintiff Sato's Title VII Claim is DENIED.

IT IS SO ORDERED.

ERIC K. NAKAMURA, et al., Plaintiff,

v.

BRUCE BABBITT, in his official capacity as Secretary of the United States Department of the Interior, Defendant.

Civ. No. 95-00243 HG

United States District Court
District of Hawaii

February 20, 1997

ORDER DENYING DEFENDANT'S MOTION TO DISMISS REGARDING EXHAUSTION OF ADMINISTRATIVE REMEDIES, GRANTING IN PART DEFENDANT'S MOTION FOR RULE 43(e) HEARING, GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING INFORMAL RESOLUTION AGREEMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING PLAINTIFF NAKAMURA'S RETALIATION CLAIM, DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT BASED UPON APPROPRIATE EMPLOYER REMEDIAL MEASURES, AND GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING LIMITATION AS TO A JURY TRIAL

GILLMOR, District Judge.

On March 28, 1995, plaintiffs Eric K. Nakamura ("Nakamura") and Ronald N. Sato ("Sato") (collectively, "Plaintiffs") filed a complaint against Defendant Bruce Babbitt, in his official capacity as Secretary of the United States Department of the Interior ("Defendant").[1] Plaintiffs are former employees of the maintenance Division of Haleakala National Park (the "Park"), and allege that various Park employees discriminated against them in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*

On February 12, 1996, Defendant filed a motion for summary judgment with respect to all of the Title VII claims asserted by Plaintiffs. On May 6, 1996, the Court heard arguments on the motion and issued an oral ruling denying it. Prior to the issuance of the Court's September 10, 1996 written Order Denying Defendant's Motion for Summary Judgment, Defendant filed a motion to Dismiss, or in the Alternative, to Reconsider Order Denying Summary Judgment, or in the Alternative Motion for a Rule 43 (e) Evidentiary Hearing (the "Second Motion").

On October 4, 1996, the Court denied Plaintiffs' *Ex Parte* Motion to Strike Defendant's Second Motion, and granted Plaintiff's alternative *Ex Parte* Motion to Extend the Time to File a Memorandum in Opposition to such motion. On October 16, 1996, the Court informed Defendant that the Second Motion failed to comply with Local Rule 220-10 regarding concise statements of fact, and granted Defendant leave to withdraw this motion and instead file multiple motions, each focusing on a particular issue.

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[1] A third plaintiff, David A. Texeira, stipulated to a dismissal of all of his claims against Defendant on July 8, 1996.

Defendant filed a new set of seven pre-trial motions dated December 12, 13 and 27, 1996 (the "Third Set of Motions"). This Third Set of Motions consists of a motion to dismiss, a motion for a Rule 43(e) evidentiary hearing, and five motions for summary judgment. These motions came on for hearing before the Court on January 27, 1997.

STATEMENT OF FACTS

This case arises out of incidents alleged to have occurred atthe Park between January 1978, when Sato began his employment with the Park, and September 1994, when Nakamura was terminated. On April 7, 1993, Nakamura and a number of his Park co-workers met with United States Congresswoman Patsy Mink and Bryan Harry, the National Park Service's Pacific Area Director. Defendant's Concise Statement in Support of Motion for Summary Judgment re: Remedial Measures at ¶ 2, and Plaintiff's Response thereto at ¶ 2. At this meeting, Nakamura lodged numerous complaints, including claims of racial and sexual harassment of employees by the Supervisor of the Park's Maintenance Division, David Puu ("Puu"). *Id.*; Nakamura Affidavit, attached as Exhibit A to Plaintiff's Opposition to Motion to Dismiss ("Nakamura Aff."), at ¶¶ 7-11.

This led to a National Park Service ("NPS") investigation of these and other claims of wrongdoing at the Park, conducted by high-ranking NPS officials between April 27 and April 30, 1993 ("NPS Investigation"). Defendant's Concise Statement in Support of Motion for Summary Judgment re: Remedial Measures at ¶ 4, and Plaintiff's Response thereto at ¶ 4. The report issued following the NPS

Investigation ("NPS Report") concluded that Puu had exhibited abusive conduct toward Park employees, including incidents of abusive language, racist remarks, and insulting demeanor, but that there was no evidence of such behavior by other Park supervisors. NPS Report, attached to Plaintiffs' March 28, 1995 Complaint, at 2.

The NPS Report contained a number of recommendations, leading to an effort by Park management to implement many of these recommendations and improve Equal Employment Opportunity ("EEO") measures. NPS Report; Defendant's Concise Statement in Support of Motion for Summary Judgment re: Remedial Measures at ¶¶ 6-16, and Plaintiff's Response thereto at ¶¶ 6-16.

Sato had already resigned from the Park in January 1992, prior to the NPS investigation. Sato Affidavit, attached as Exhibit B to Plaintiff's Opposition to Motion to Dismiss ("Sato Aff."), at ¶ 2. Nakamura was terminated from his temporary employment position with the Park on September 30, 1994. Defendant's Concise Statement in Support of Motion for Summary Judgment re: Resolution Agreement at ¶ 18, and Plaintiff's Response thereto at ¶ 18; Informal Resolution Agreement, attached as Exhibit A to Defendant's Motion for Summary Judgment re: Resolution Agreement at ¶ 4.

ANALYSIS

I. Defendant's Motion to Dismiss Regarding Failure to Exhaust Administrative Remedies

The Court first addresses Defendant's Motion to Dismiss Regarding Failure to Exhaust Administrative Remedies ("Defendant's Motion to Dismiss"). Defendant filed this motion on December 27, 1996, although he had already filed a nearly identical motion for summary judgment on these same grounds on December 12, 1996. Defendant contends that a motion to dismiss is the proper form in which to bring this claim and that the Court, rather than a jury, should determine whether Plaintiffs properly exhausted their administrative remedies because it is a jurisdictional or jurisdictionally-related issue.

The Ninth Circuit has held that[:]

> ([l]ack of jurisdiction and failure to exhaust administrative remedies are matters in abatement, and ordinarily do not deal with the merits . . . . Therefore, they should be raised by a motion to dismiss.

Studio Elec. Technicians Local 728 v. International Photographers of the Motion Picture Indus., Local 659, 598 F.2d 551, 552 n.2 (9th Cir. 1979). In the context of a Title VII action, however, the Supreme Court has explicitly held[:]

> that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

The Supreme Court subsequently eliminated any potential mischaracterization of *Zipes* as standing for the proposition that the timely filing requirement need not be met or that it should be lightly excused:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826. ... (1980), "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984). In *Vinieratos v. United States Dep't of Air Force*, 939 F.2d 762, 768 n.5 (9th Cir. 1991), the Ninth Circuit indicated that it does not[:]

> recognize administrative exhaustion under Title VII as a jurisdictional requirement per se; [but] as a legal question under the de novo standard because the issue is whether the plaintiff has satisfied a statutory precondition to suit.

Accordingly, Defendant's motion to dismiss regarding Plaintiffs' alleged failure to exhaust their administrative remedies is not analyzed pursuant to Fed. R. Civ. P. 12 (b) (1) ("lack of jurisdiction over the subject matter"), but Fed. R. Civ.P.12 (b) (6) ("failure to state a claim upon which relief can be granted"). Whether Plaintiffs did

adequately exhaust their administrative remedies is a question of law for the Court to decide. These issues are not, as Plaintiffs contend, so intertwined with the merits of Plaintiffs' Title VII claims that they must be resolved at trial. They involve whether Plaintiffs are entitled to relief for their claims in this forum by having fulfilled all of the statutory and regulatory preconditions to filing suit. These procedural matters are properly resolved by the Court and in no way go to the merits of Plaintiffs' substantive claims.

The Court already has held that Nakamura did adequately exhaust his administrative remedies with respect to his "Leave Incident" retaliation claim. September 10, 1996 Order Denying Defendant's Motion for Summary Judgment ("September 10, 1996 Order") at 5-6. The Court further found that there were genuine issues as to whether Sato had satisfied this requirement or is entitled to equitable estoppel with respect to his claim as well. *Id.* at 11-12.

Defendant urges the Court to hold a Rule 43 (e) evidentiary hearing, which Defendant contends will provide the Court with sufficient evidence to make all necessary factual findings to decide the exhaustion issue. The consequence of holding such a hearing, however, is to take the matter outside the bounds of a Fed. R.Civ. P. 12 (b) (6) motion and to convert it into a motion for summary judgment governed by Fed. R. Civ. P. 56.[2] Accordingly, the Court DENIES Defendant's Motion to Dismiss and will consider it instead pursuant

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[2] Fed. R. Civ. P. 12 (b) provides in pertinent part: If, on a motion asserting a defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56 ....

to Rule 56 along with Defendant's motion for summary judgment on the same grounds.

II. Defendant's Motion for Rule 43(e) Hearing

Defendant moves for the Court to hold a Rule 43 (e) evidentiary hearing regarding several issues he contends that the Court should consider prior to trial. These issues include whether Plaintiffs are entitled to equitable estoppel to excuse their untimely filing of EEO complaints, whether the Informal Resolution Agreement is applicable and bars Nakamura's claims, whether Nakamura is entitled to a trial on the merits of his claims of wrongful termination and retaliation, and whether Defendant took appropriate remedial measures and disciplinary action thereby relieving it from liability. Plaintiffs contend that such a hearing is not appropriate because these issues are completely intermeshed with the facts going to the merits of the case and should be left for the jury to decide.

For the reasons set forth below in the analysis of Defendant's motions for summary judgment, the Court agrees with Defendant that a pretrial evidentiary hearing would be appropriate and useful to assist the Court in determining whether Plaintiff Sato has fulfilled his statutory preconditions to filing suit. A Rule 43 (e) evidentiary hearing would be either unnecessary or inappropriate, however, in deciding the other issues proposed by Defendant. The Court GRANTS IN PART Defendant's Motion for a Rule 43(e) Hearing.

III. Defendant's Motions for Summary Judgment

Defendant has filed five separate motions for summary judgment covering the issues of Plaintiffs, failure to exhaust administrative remedies, Nakamura's informal resolution agreement, Nakamura's retaliation claim, Defendant's implementation of appropriate remedial measures, and the limitation on Plaintiffs, right to a jury trial.

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> ... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S.317, 323 (1986)). The movant need not advance affidavits or similar materials to negate the existence of an issue on which the opposing party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323.

If the moving party meets its burden, then the opposing party must come forward with "specific facts showing that there is a genuine issue for trial" in order to defeat the motion. Fed. R. Civ. P. 56(e), *T.W. Elec.*, 809 F.2d at 630. The opposing party cannot stand on the pleadings nor simply assert that it will discredit the movant's evidence at trial. *Id.* "If the factual context makes the [opposing] party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Cal. Arch. Bldg. Prods. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987) (emphasis added) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)), *cert. denied* 484 U.S. 1006 (1988).

The standard for summary judgment reflects the standard governing a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). When there is a genuine issue of material fact, "the judge must assume the truth of the evidence set forth by the [opposing] party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.*

B. Sato

Sato claims that his supervisor at the Park, Puu, subjected him to a persistent barrage of ethnic slurs and discriminated against him on the basis of his Japanese ancestry in violation of Title VII. Defendant's primary argument with respect to Sato is that his suit is barred because he failed to exhaust his administrative remedies. "Title VII specifically requires a federal employee to exhaust his administrative remedies as a precondition to filing suit." *Vinieratos*,

939 F.2d at 767-768 (citing *Brown v. General Servs. Admin.*, 425 U.S. 820, 832 (1976)). Defendant argues that Sato failed to exhaust his administrative remedies because he filed his first informal EEO complaint over two years after he had resigned from the Park Service, and thereby failed to comply with the statutory requirements.

Sato contends that he did exhaust his administrative remedies or, in the alternative, that he is entitled to equitable estoppel. The Ninth Circuit has "recognized that strict compliance with the filing period may be excused 'if the plaintiff had neither official notice nor actual knowledge of the filing period.' " *Thornhill v. Marsh*, 866 F.2d 1182, 1184 (9th Cir. 1989).

Sato claims that during the period he was employed by the Park from January 1978 to January 1992, he was racially harassed at least three times a week by Puu. Sato Aff. at ¶ 3. As these incidents occurred prior to October 1, 1992, 29 C.F.R. Part 1613 governs the question of whether Sato properly exhausted his administrative remedies.[3] Section 1613.214(a) provides, in pertinent part:

> (1) An agency shall require that a complaint be submitted in writing by the complainant or representative and be signed by the complainant.... The agency may accept the complaint for processing in accordance with this subpart only if:
> (i)The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter

[3] The current regulatory provision governing Title VII complaints, 29 C.F.R. Part 1614, did not go into effect until October 1, 1992. 57 Fed. Reg. 12634 (1992).

causing him/her to believe that he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and

(ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days after the receipt of the notice of the right to file a complaint....

(4) The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

29 C.F.R. § 1613.214(a) (1991) (emphasis added).

The Department of the Interior dismissed Sato's complaint for failure to comply with the statutory time limits because he did not initiate contact with an EEO counselor until February 4, 1994, over two years after he had resigned in January 1992. September 19, 1996 letter from Melodee Stith, EEO Director for the Department of the Interior ("Stith Letter"), attached as Exhibit Y to Plaintiffs' Opposition to Motion to Dismiss, at 2. Sato claims in affidavit, however, that:

> [in] the mid to late 1980s, I met Becky Mills at two orientations in ... California and found out that she was an Equal Employment Officer for the Western Region office. I told her that my supervisor, Mr. Puu, was calling me "one stupid Jap" and "fucking Jap" on a regular basis. I also told her that since I had started at Haleakala in 1978 I have only been assigned to sanitation duties despite the fact that I am qualified to do other work such as carpentry and masonry. Ms. Mills responded that my situation was personal. She did not inform me that I had the right to file an equal employment opportunity complaint or any other complaint for that matter.

Sato Aff. at ¶ 9.

If these allegations are true, Sato may have satisfied the first requirement of reporting the discriminatory matter to an EEO officer within 30 days. The second requirement, however, is that a written complaint be submitted within 15 calendar days after the date of receipt of the notice of the right to file a complaint. it is undisputed that Sato never filed a written complaint until over two years after he had resigned from the Park and the alleged incidents of discrimination against him had ended.

Sato alleges in his affidavit that he was not aware of his right to file an EEO complaint of discrimination until late December 1993, when Nakamura informed him that he had such a right. Sato Aff. at ¶ 12. If Sato's allegations are true, the fifteen-day time limit for filing a written EEO complaint would have begun to run on that date. Sato

did not approach an EEO counselor until February 4, 1994, after this fifteen-day period had run. Stith Letter at 2. His formal EEO complaint was filed on May 13, 1994. *Id.* at 1.

Sato would have been entitled to have the NPS excuse him from the mandated time limits, if he could show that there was no official notice of the time limits or that he was not otherwise aware of them. 29 C.F.R. § 1613.214 (a) (4) (1991) ; *Thornhill,* 866 F.2d at 1184. If Sato received actual or official notice of the applicable time limits at any time prior to filing his written complaint, the 15-day time limit for filing the complaint would have been triggered at the time he received such notice.

In July 1988, the Park superintendent issued a memorandum addressed to all employees that two new EEO counselors were being appointed and that they would be available to serve the needs of the employees. Defendant's Motion to Dismiss at Exhibit A. Plaintiffs maintain that the Park's system of distributing memoranda to employees was grossly inadequate and that they never received any such memoranda. Nakamura Aff. at ¶ 13. Defendant has provided declarations of numerous park employees claiming that EEO posters were put up on Park bulletin boards with pictures of the EEO counselors and directing employees to approach them with any questions or complaints. An October 25, 1988 memorandum from the NPS Western Region office, relaying the results of an EEO performance evaluation conducted in September 1988, states that, "[t]he right to complain and the steps in preparing and submitting complaints are explained in writing to employees via posting on

employee bulletin boards." Defendant's Motion to Dismiss at Exhibit A.

Defendant also has provided evidence that Sato served as the maintenance representative on the Park's EEO committee from 1988 through 1990, and that memoranda addressed to all employees were issued instructing employees to discuss questions or relevant problems with such representatives. *Id.* Sato claims in his affidavit that Puu told him that he was on the committee because they needed a "body" from the maintenance division, and that he only attended one meeting of the committee, in which the members merely "s[a]t around and talk[ed] story." Sato Aff. at ¶ 11. One of Defendant's own declarants, Susan Nikaido, admits that the committee was not very active, but adds that the few times they did meet Sato usually attended. Defendant's Motion to Dismiss at Exhibit A.

Sato alleges that although he realized the purpose of the committee was to discuss the Park's hiring and firing practices with respect to minorities, the topic of employees, rights to be free from racial discrimination and ethnic slurs was never mentioned. Sato Aff. at ¶ 11-12. Sato claims that it was not until December 1993, after speaking with Nakamura, that he became aware that Puu's conduct towards him had constituted discrimination and entitled him to file an EEO complaint. *Id.* Sato also relies on the findings of the NPS Report, that "[m]any employees appeared to have little knowledge of their rights," and which recommends that the Park "[u]pdate and prominently post grievance procedures and equal opportunity counselors." NPS Report at ¶ 2.

The Court held in its September 10, 1996 Order that, based on the evidence presented to it at that time, a genuine issue existed as to Sato's alleged failure to exhaust his administrative remedies. September 10, 1996 Order at 11-12. As stated in the preceding section, the Court will hold an evidentiary hearing to determine this issue given the conflicting evidence presented. If Sato did approach Ms. Mills back in the mid-1980s with actionable complaints of racial discrimination, and he was not informed of his right to be free from discrimination and his ability to file a complaint concerning that right, he would be entitled to equitable tolling of the time requirement for filing such a complaint. This tolling would last, however, only until the point when he was provided with actual or official notice of his right to file a complaint. As the Supreme Court has stated in another Title VII case, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence," *Baldwin County Welcome Ctr.*, 466 U.S. at 151 (1984).

At the Rule 43 (e) evidentiary hearing, the parties may present all admissible evidence regarding Sato's alleged failure to exhaust his administrative remedies as well as evidence pertaining to Sato's request for equitable relief excusing him from any such failure that the Court may find. If the Court determines on the basis of the evidence presented that Sato did fail to properly exhaust his administrative remedies and that he is not entitled to equitable relief therefrom, Sato's claims would be dismissed accordingly. If, however, the Court does not so determine and Sato is allowed to pursue his claims against Defendant, Defendant requests that the subsequent jury trial be limited to conduct which occurred on or after November 21, 1991.

The Civil Rights Act of 1991 (the "Act") went into effect on November 21, 1991. In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 1508 (1994), the Supreme Court held that Section 102 of the Act, which allows Title VII plaintiffs to seek compensatory and punitive damages and provides them with the right to a jury trial when they seek such damages, does not have retroactive effect. Prior to the enactment of the Act, "Title VII afforded only 'equitable' remedies[,"] primarily in the form of backpay, and no right to a jury trial existed. *Id.* at 1490.

Accordingly, Defendant's Motion for Partial Summary Judgment Regarding Limitation as to a Jury Trial is GRANTED to the extent that Plaintiffs are entitled to a jury trial only with respect to claims of discrimination arising out of conduct that occurred on or after November 21, 1991.

C. Nakamura

Due to the vague nature of the complaint filed with the Court, Plaintiffs' counsel was asked at the January 27, 1997 hearing to specify the nature and extent of Nakamura's claims. Plaintiffs' counsel indicated that Nakamura has three claims: (1) discrimination based on his Japanese ancestry for events that occurred prior to April 1993; (2) a retaliation complaint for events occurring between April and September 1993 stemming from his involvement in instigating the National Park Service's investigation of possible Title VII violations at the Park by Puu; and (3) a second retaliation complaint for incidents that took place after his return to the Park in March 1994 up through and including his termination in September 1994.

1. Racial Discrimination Claim

Plaintiffs have not identified for the Court any evidence of incidents occurring prior to April 1993 that indicate that Nakamura was discriminated against on the grounds of race. Mr. Nakamura's pleadings all appear to center around his belief that he was retaliated against by his co-workers and supervisors as a result of exposing Puu's alleged racial and sexual harassment of others.

In his Informal Complaint Regarding Sexual/Racial Harassment dated December 2, 1993, he states that he is a "third party complainant on a racial discrimination and harassment charges against Mr. David Puu." December 2, 1993 Complaint, attached as Exhibit M to Plaintiff's Opposition to Motion to Dismiss. Nakamura brought the informal complaint on behalf of Sato and Francis Silva, neither of whom signed the complaint. He further states in the complaint that "[t]here are other employees (former and current) that have informed me that Mr. Puu had been racially abusive or otherwise very insulting to their sex, work efforts, or intelligence." *Id.*

Although Nakamura's informal complaint contains several allegations that Puu racially and sexually harassed a number of other employees, not once does Nakamura claim in his complaint that he was subjected to racial discrimination himself during this period. The sole item in the record that the Court has been able to find with respect to a racial harassment claim by Nakamura, is an incomplete and vague allegation contained in a written statement of Nakamura dated November 26, 1993 ("Nakamura Statement"), that "Mr. Puu has racially harassed me by calling one of my family member _____." (Blank appears in original). Plaintiff's Opposition to Motion to

Dismiss at Exhibit L. The record is unclear as to whether the Nakamura Statement was ever submitted as a complaint, but it appears to be a prior version of the December 2, 1993 Complaint filed the following week.

There is ample evidence in the record indicating that Puu may have racially harassed and discriminated against certain Park employees, including Sato. With nothing more than an alleged unspecified racial comment directed at a family member, however, Nakamura has not presented the Court with enough evidence to sustain an individual claim of racial discrimination. *See Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986) ("'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to sufficiently significant degree to violate Title VIII") (citing *Rocers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

Even assuming there was sufficient evidence of racial discrimination against Nakamura prior to April 1993, he would also be barred from bringing this claim due to the Informal Resolution Agreement he entered into with the Park on February 15, 1994 which covered all of Nakamura's previous complaints. Accordingly, the Court GRANTS IN PART Defendant's motions for summary judgment with respect to Nakamura's racial discrimination claim.

2. Retaliation Claim for April-September 1993 Incidents

The second claim Nakamura brings is based on retaliation he allegedly suffered during the period from April to September 1993 stemming from his involvement in triggering the aforementioned NPS Investigation. Defendant contends that Nakamura is barred from bringing this claim due to an Informal Resolution Agreement he entered into with the NPS in February 1994. Nakamura asserts that Defendant committed a material breach of that agreement, entitling him to revive this claim.

On November 18, 1993, Nakamura submitted a written informal complaint and sought counseling with a Park EEO Counselor concerning racial and sexual harassment of Park employees by Puu and apparently because of harassment he endured in attempting to expose these alleged violations. Plaintiffs' Opposition to Motion to Dismiss at Exhibit K. This led to his filing, on December 2, 1993, an Informal Complaint Regarding Sexual/Racial Harassment with the Park Superintendent covering these same allegations. As a result of these complaints, Nakamura and the NPS entered into an Informal Resolution Agreement of Informal Discrimination Complaint by Eric K. Nakamura dated February 14, 1994 (the "Resolution Agreement"). Plaintiffs' Opposition to Motion to Dismiss at Exhibit N.

The Resolution Agreement agreed to all of Nakamura's demands in his Informal Complaint and provided him with additional consideration. Pursuant to the Resolution Agreement, the Park Service agreed to counsel Puu regarding racial and sexual harassment, remove him from the Maintenance Division and place him in a non-

supervisory position until his retirement, return Nakamura to his previous temporary position for the duration of Fiscal Year 1994, pay Nakamura a cash settlement of $4,000 and reinstate 153 hours of annual leave, and to not retaliate against Nakamura for having filed this complaint.

The agreement is authorized and governed by 29 C.F.R. Part 1614. Section 1614.603 provides that

> "[e]ach agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any settlement reached shall be in writing and signed by both parties and shall identify the allegations resolved."

Section 1614.504 governs compliance with the Resolution Agreement and sets forth the proper procedures a complainant must follow to allege breach on the part of the agency. Section 1614.504(a) provides, in pertinent part:

> If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or final decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may

> request that the terms of settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

The Informal Agreement itself reiterates the need to file a written notice of noncompliance within 30 calendar days of the date Nakamura became aware of the noncompliance.

Nakamura claims that the Park's failure to credit his 153 hours of annual leave by March 20, 1994, the date by which all action in the agreement was to occur, constitutes a breach of the agreement by the Park and allows him to reinstate his original complaint. Defendant asserts that the annual leave hours were simply not input into the NPS computer by the deadline due to a clerical error in the Denver office where such inputting takes place. Defendant claims that such a failure to input these hours does not constitute a material breach of the agreement as the hours were available to Nakamura if he had merely gone to Superintendent Reeser, the individual specified in the agreement as responsible for fulfilling the Park's obligations thereunder, and requested them. Once the Park became aware of the oversight by way of Nakamura's May 22, 1994 complaint on the matter, it took prompt action and the hours were input into the system by June 3, 1994.

The Court agrees with Defendant that given the circumstances and the Park's prompt remedial action once Nakamura notified it of the problem, the mere failure to input these hours into the computer does not appear to constitute a material breach of the agreement. Even assuming there had been a material breach, however, Plaintiff would

be barred from bringing his claim here because he failed to fully exhaust his administrative remedies pursuant to 29 C.F.R. 1614.504.

Because Nakamura became aware of the Park's failure to input his leave into the payroll computer on April 9, 1994, his May 22, 1994 complaint regarding the alleged breach did not meet the aforementioned 30-day deadline for filing a written complaint. Plaintiff's Concise Statement in Opposition to Motion for Summary Judgment re: Resolution Agreement at ¶ 12. Nakamura claims that he orally notified EEO Counselor Nagata about the matter upon becoming aware of it on April 9 and that Nagata promised to investigate. *Id.* It was only upon Nakamurals return to work on May 16, 1994 that he realized that Nagata had not resolved the matter and he filed a written complaint six days later. *Id.*

Even assuming Nakamura is entitled to have his failure to meet the 30-day deadline for filing a written complaint equitably tolled based on Nagata's alleged promise to investigate, he still would not have fully complied with the requirements of Section 1614.504. A June 6, 1994 letter to Nakamura from Mary Kline, the Park Service's Lead EEO Counselor for the Western Region, informed him that his leave had been input into the system, but that if he still desired to pursue reopening his case, he had to send the letter to the Park Service's Washington office and follow the rest of Section 1614.504's requirements, which she attached to the letter. Defendant's Motion for Summary Judgment re: Resolution Agreement at Exhibit C.

A June 6, 1994 letter from the Park's EEO Counselor Melia Lane-Hamasaki informed Nakamura's counsel that a copy of counsel's May 31, 1994 letter regarding reinstatement of Nakamura's informal

complaint and alleging breach of the Resolution Agreement was being forwarded to the NPS Washington office. Plaintiffs' Opposition to Motion to Dismiss at Exhibit T. Apparently, Nakamura also filed an official informal complaint with NPS regarding retaliation and the alleged breach of the agreement due to failure to credit him annual leave on June 1, 1994, though the date of the complaint is illegible on the copy submitted to the Court and it is unclear where this complaint was sent. Plaintiffs' Opposition to motion for Summary Judgement re: Resolution Agreement at 8; Exhibit K to Concise Statement attached thereto.

Again, even assuming that the above facts could establish that Nakamura had met the appropriate 30-day deadline for filing his complaint of breach with NPS, he failed to file the required written appeal with the Equal Employment Opportunity Commission ("EEOC"), and is therefore barred from bringing a claim of breach before this Court for failure to exhaust his administrative remedies. If Nakamura was not satisfied with the Park Service's resolution of his breach allegation, he needed to appeal that agency's action to the EEOC.

> If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal

> within 30 days of his or her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

29 C.F.R. 1614.504(b).

There is no evidence that Nakamura ever filed such an appeal to the EEOC indicating that it was unhappy with the Park's resolution of the matter by finally crediting him with the additional hours on the computer. A plaintiff may not cut short the administrative process prior to its final disposition, "for upon abandonment a claimant fails to exhaust administrative relief and may not thereafter seek redress from the courts." *Greenlaw v. Garrett*, 59 F.3d 994, 997 (9th Cir. 1995). Nakamura did not exhaust his administrative remedies pursuant to Section 1614.504, therefore he is not entitled to bring this claim before the Court. *See Lee v. United States*, 33 Cl. Ct. 374, 380 (1995); *Davis v. Secretary of Treasury, Internal Revenue Serv.* , 896 F. Supp. 978, 981 (N.D. Cal. 1995).

Defendant's motions for summary judgment are GRANTED IN PART with respect to Nakamura's retaliation claim for incidents occurring between April and September 1993.

3. Retaliation Claim for March-September 1994 Incidents

Nakamura's final claim is for alleged retaliatory events that occurred following his return to work on March 20, 1994 up through and including his termination on September 30, 1994. In its September 10, 1996 Order Denying Defendant's Motion for Summary Judgment, the Court held that Nakamura had established a prima facie case of retaliation for incidents that occurred during this time period. The Court also held that this claim was not barred by any resolution agreements nor by any alleged failure by Nakamura to exhaust his administrative remedies. Defendant has not presented any new evidence or arguments that persuade the Court that its prior decision was in error.

The Court also rejects Defendant's request for a pre-trial evidentiary hearing on the issues of retaliation by co-workers, employment termination, and whether Defendant implemented appropriate remedial measures. The Ninth Circuit has held that

> "[o]nce a prima facie case is established...summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the elusive factual question of intentional discrimination." *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995), *cert. denied*, _____ *U.S.* ____, 116 S.Ct. 1261 (1996) (citations omitted). Once a plaintiff has set forth a prima facie case of retaliation as well as a

> genuine issue of fact as to pretext, which the Court already has decided that Nakamura has done, the district court does not hear and weigh the evidence to decide whether a defendant violated Title VII. That task is within the province of the jury.

The Court is also not persuaded by Defendant's argument that Nakamura is precluded from bringing his employment termination based on retaliation claim because he did not amend his EEO complaint to include that claim. The Ninth Circuit has stated that district courts may hear claims from events occurring after the filing of an EEO charge, so long as they are "like or reasonably related to" the conduct complained of in the charge. *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990). Nakamura's EEO complaints alleged that he was being retaliated against by his supervisors and co-workers because of his activity in exposing Puu's conduct. The Court does not agree with Defendant that Nakamura needed to file an additional EEO complaint regarding his alleged retaliatory termination, when he had already complained of adverse employment actions against him based on retaliation.

Defendant has characterized Nakamura's retaliation complaint as stemming from his mere receipt of the "cold-shoulder" from his co-workers. Nakamura has offered evidence that the conduct of his co-workers upon his return to work rose beyond a mere failure to extend friendly overtures. He has alleged that his co-workers behaved towards him in a manner that interfered with his ability to perform his job. *See* January 7, 1997 Nakamura Affidavit ("Second Nakamura Aff."), attached as Exhibit E to Plaintiff's Concise Statement in

opposition to Defendant's Motion for Summary Judgment Re: Retaliation Claim, at ¶¶ 4-20.

As stated in the Court's previous order, if Nakamura can prove at trial that the conduct of his co-workers and supervisors created a hostile work environment that led to his stress leave, that would constitute an adverse employment action within the ambit of Title VII. *See Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 869 (9th Cir. 1996). Although it is not disputed that Defendant attempted remedial measures to stem any retaliation against Nakamura by his co-workers, the Ninth Circuit has repeatedly held that "an employer's actions will not necessarily shield it from liability if harassment continues." *Fuller v. City of Oakland*, 47 F.3d 1522, 1529 (9th Cir. 1995) (citation omitted).

For the reasons set forth above and in the Court's September 10, 1996 order, Defendant's motions for summary judgment are DENIED with respect to Nakamura's retaliation claim following his return to work in March 1994.

CONCLUSION

In accordance with the foregoing, it is HEREBY ORDERED that:

1. Defendant's Motion to Dismiss Regarding Failure to Exhaust Administrative Remedies is DENIED.

2. Defendant's Motion for Rule 43(e) Hearing Re:

Equitable Estoppel; the Informal Resolution Agreement; Employment Termination is GRANTED IN PART. The Court will hold an evidentiary hearing limited to Defendant's motion for summary judgment as to Sato's claims based on his alleged failure to exhaust administrative remedies.

3. Defendant's Motion for Summary Judgment Regarding Informal Resolution Agreement is GRANTED IN PART with respect to Nakamura's racial discrimination claim and his April to September 1993 retaliation claim.

4. Defendant's Motion for Summary Judgment Regarding Plaintiff Nakamura's Retaliation Claim is DENIED.

5. Defendant's Motion for Partial Summary Judgment Based Upon Appropriate Employer Remedial Measures is DENIED.

6. Defendant's Motion for Partial Summary Judgment Regarding Limitation as to a Jury Trial is GRANTED to the extent that Plaintiffs are entitled to a jury trial only with respect to claims of discrimination arising out of conduct that occurred on or after November 21, 1991.

IT IS SO ORDERED.

ERIC K. NAKAMURA, et al., Plaintiff,

v.

BRUCE BABBITT, in his official capacity as Secretary of the United States Department of the Interior, Defendant.

Civ. No. 95-00243 HG

United States District Court
District of Hawaii

October 30, 1997

ORDER GRANTING DEFENDANT'S RULE 12(h)(3) MOTION TO DISMISS, GRANTING DEFENDANT'S RENEWED RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW, DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO CLAIMS ONE AND THREE, DENYING PLAINTIFF'S MOTION FOR ORDER GRANTING BACK PAY, REINSTATEMENT, OR, ALTERNATIVELY, FRONT PAY, AND DENYING PLAINTIFF'S MOTION FOR ORDER GRANTING AN AWARD OF ATTORNEY'S FEES AND COSTS OF LITIGATION

Plaintiff Eric K. Nakamura ("Plaintiff") is a former temporary maintenance employee at Haleakala National Park (the "Park"), who was terminated in September 1994. Plaintiff filed a Title VII complaint against defendant Bruce Babbitt, in his official capacity as

Secretary of the United States Department of the Interior ("Defendant"), alleging various claims of retaliatory treatment by Park co-workers and supervisors stemming from Plaintiff's involvement in certain protected equal employment opportunity ("EEO") activities. After the pre-trial dismissals of two co-plaintiffs and all but three of Plaintiff's claims, Plaintiff's remaining claims of retaliation by refusing to grant requested leave status for one-half day ("Claim One"), terminating Plaintiff ("Claim Two"), and failure to stop Plaintiff's co-workers from creating a hostile work environment ("Claim Three") were tried before a jury, commencing on June 3, 1997. On June 24, 1997, the jury returned a verdict in favor of Defendant on Claims One and Three, and in favor of Plaintiff on Claim Two. The jury awarded Plaintiff $30,000 in compensatory damages with respect to Claim Two.

On June 24, 1997, the Court ordered the parties to submit all post-trial motions within ten days. Presently before the Court are five post-trial motions submitted by the parties on July 7, 1997 in accordance with the Court's instruction.

STATEMENT OF FACTS[4]

In 1989, Plaintiff began working at the Park as a temporary maintenance worker. In April 1993, Plaintiff and several of his co-workers contacted a member of Congress and lodged numerous

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[4]For a more complete statement of the factual and procedural history of this case, please see the Court's orders of September 10, 1996, February 20, 1997, and June 2, 1997.

complaints, including claims of racial and sexual harassment, against a supervisor in the Park's Maintenance Division, David Puu ("Puu"). At the Congress member's request, the National Park Service ("NPS") sent a team of NPS officials to the Park to investigate Plaintiff's complaints. The investigators issued a report concluding that Puu had exhibited abusive behavior toward maintenance employees on many occasions, including the use of racist remarks, but that there was no evidence of such conduct on the part of other supervisors. The report directed Park officials to make human resource management a top priority, and steps were taken to improve EEO training and communications at the Park.

At the end of September 1993, Plaintiff requested that he be allowed to take time off from his temporary position due to stress, and Park officials authorized Plaintiff to go on intermittent status. Plaintiff remained off work until March 20, 1994. During this period that Plaintiff was away from the Park on intermittent status, he filed two EEO complaints with the NPS.

In November 1993, Plaintiff lodged an EEO complaint alleging that Puu had engaged in sexual and racial harassment of some of Plaintiff's co-workers, and claiming that Plaintiff had been harassed for his involvement in generating the NPS investigation. Plaintiff's EEO complaint was resolved via an informal resolution agreement between Plaintif f and the Park. The Park agreed to transfer Puu out of the maintenance division and place him in a non-supervisory capacity until his upcoming retirement. The informal resolution agreement also provided that Plaintiff was to return to work on March 20, 1994 to his previous temporary position for the duration of fiscal year 1994.

Prior to Plaintiff's return to work, the new chief of the maintenance division, Pedro Lucero ("Lucero"), held a meeting to ensure that Plaintiff's co-workers in the maintenance division understood that management was welcoming Plaintiff's return to the understaffed maintenance division. Lucero was a career NPS employee who was transferred from another National Park into Haleakala National Park during the time Plaintiff was on intermittent status. Lucero informed the maintenance employees that they were to put the past behind them and start a new beginning as a team. Some of Plaintiff's fellow maintenance employees had worked with Puu for many years and were upset about Puu's removal from the maintenance division. Plaintiff's fellow maintenance workers Elizabeth Havelin ("Havelin"), Bob Kokubun, and Jesse Mercado ("Mercado") testified at trial that they did not agree with some of Plaintiff's allegations against Puu and disapproved of Plaintiff's activities that led to Puu's removal. At the meeting held by Lucero prior to Plaintiff's return to work, Mercado made comments regarding his concerns about the possible ramifications of Plaintiff's return to work and stated that he did not want to work with Plaintiff. Maintenance employees were warned that acts of reprisal would not be tolerated and that appropriate management actions would be taken if inappropriate behavior occurred.

After Plaintiff was informed of Mercado's comments at the meeting, Plaintiff lodged an EEO complaint in response to Mercado's comments on approximately February 19, 1994. At Plaintiff's request, Lucero held another meeting with both Mercado and Plaintiff, where he allowed them to air any differences and Lucero reaffirmed management's expectations of professional attitudes and work behavior. Lucero also issued two memoranda to all maintenance

employees reiterating that professionalism must be maintained at all times and that reprisal actions would not be tolerated. Plaintiff and the Park entered into a second informal resolution agreement documenting the above actions in response to Plaintiff's second EEO complaint.

Plaintiff returned to his temporary maintenance position at the Park on March 20, 1994. After two months back on the job, Plaintiff requested and was granted leave for stress on May 19, 1994. Plaintiff did not return to work until May 26, 1994. On the morning of May 26th, Plaintiff approached Lucero to complain that the Jet Johns were not pumped out when Plaintiff was off on leave. Lucero told Plaintiff not to worry about it and that Lucero would have it done the following day, which was Plaintiff's day off. Plaintiff became upset because he felt that his co-workers were deliberately refusing to cover for Plaintiff while he was on leave. Plaintiff kicked a NPS vehicle, drove away, and did not finish his shift. Lucero disapproved a leave slip submitted by Plaintiff for the hours that he missed that day, and noted on the slip that Plaintiff left without authority when he was needed at work. Plaintiff claimed that the acting Park superintendent gave him permission to leave work that day.

Plaintiff did not return to work at the Park after May 26, 1994 and requested leave from work due to occupational stress. All of Plaintiff's subsequent requests for leave after May 26th were approved. On August 2, 1994, Plaintiff completed an application for leave requesting indefinite leave without pay until further notice by Plaintiff. On September 9, 1994, Lucero notified Plaintiff that he would be terminated effective September 30, 1994, due to the Park's inability to fund Plaintiff's temporary maintenance position for fiscal year 1995.

Defendant presented testimonial and documentary evidence that, in preparing the proposed maintenance division budget for fiscal year 1995 in September 1994, Lucero was operating under a number of budgetary constraints. The Park was operating in anticipation that a continuing resolution of Congress would go into effect on October 1, 1994 that would freeze federal agency expenditures at 1994 fiscal year levels. Lucero testified that he was told to anticipate a further reduction of $50,000 from the maintenance division budget due to the early retirement buyout of Puu. The Park received memoranda from NPS headquarters indicating that, for every employee that opted for early retirement, the salary and benefits from that position would be lost unless the position was filled by a transfer from a central NPS office. These requirements were set forth in the buyout bill signed by the President, the goal of which was to help the federal government meet its goal of cutting approximately 252,000 federal employees. Evidence was presented that Lucero had to operate under this reduced budgetary figure despite the May 1994 transfer to the maintenance division of a permanent sanitation employee from another National Park, Donald Perkey ("Perkey"), and other cost increases.

Defendant presented testimonial and documentary evidence that the budgetary figure Lucero was given to work with meant that a total of three temporary employee positions would have to be eliminated in fiscal year 1995. Bryan Harry ("Harry"), the NPS Pacific Area Director in 1994, testified that when funds are short, temporary employees must be discharged prior to permanent employees pursuant to federal civil service regulations, and that terminations of temporary employees for lack of funds was not unusual. Park Superintendent Donald Reeser ("Reeser") testified that numerous temporary employees were let go by the Park between 1988 and 1994 for

financial reasons. Lucero decided to terminate Plaintiff, Havelin, and Jimmy Korn ("Korn"), and all three received termination letters.

Lucero testified that he used the little money he had in the budget for temporary employees to keep Havelin and Korn on the payroll for the first four pay periods in fiscal year 1995. He testified that Plaintiff was not kept on the payroll at the beginning of fiscal year 1995 like Korn and Havelin, because Plaintiff was still out on indefinite requested stress leave and had not indicated that he was able to return to work. Plaintiff was terminated effective September 30, 1994. Lucero testified that the scheduled November 1994 terminations of Korn and Havelin did not take place because the Park received notice in November that the expected loss of $50,000 from Puu's buyout did not occur because NPS headquarters failed to record the buyout. Lucero and Reeser both testified that the temporary maintenance position held by Plaintiff has not been filled since his termination because they have never had the funds to do so.

Plaintiff disputed Defendant's budgetary explanation for terminating Plaintiff through cross-examination of Defendant's witnesses, and by calling as a witness Audrey Cordeiro ("Cordeiro"), who was a Park administrative assistant during 1993 and 1994 whose responsibilities included handling of budgetary and financial matters. Cordeiro testified as a lay witness who was familiar with general Park budgetary matters, but she was on maternity leave from approximately October 1994 though June or July 1995 and did not provide any testimony specifically related to the 1995 fiscal year budget. Cordeiro testified that she learned that, at times, monies had been shifted between Park divisions, but that she could not recall any specific instance of a shift of monies between divisions from 1990 to October

1994. Cordeiro also testified that she was not sure if Plaintiff was replaced after he was terminated.

Between November 1993 and January 1995, Plaintiff filed three formal and several informal EEO complaints with the NPS involving claims of retaliatory treatment by Plaintiff's co-workers and supervisors. After considering the evidence presented at trial, the jury found that Plaintiff's co-workers did not subject Plaintiff to an abusive or hostile work environment. The jury also found that Defendant's decision not to give Plaintiff requested leave status for a half day on May 26, 1994, after Plaintiff left work without Lucero's permission, did not result from retaliation by Defendant for Plaintiff's EEO activities. The jury did find, however, that Plaintiff was terminated by the Park in retaliation for having engaged in protected activities. None of the EEO complaints submitted by Plaintiff to the NPS contained an allegation that he was terminated from his temporary position in retaliation for having engaged in Protected activities. The sole EEO complaint filed by Plaintiff after his termination, dated January 24, 1995, involved a yearly performance evaluation and was resolved by Defendant's withdrawal of the challenged evaluation.

ANALYSIS

1. DEFENDANT'S RULE 12(h)(3) MOTION TO DISMISS

On July 7, 1997, Defendant lodged a Rule 12(h)(3) Motion to Dismiss ("Defendant's Motion to Dismiss") along with an Ex Parte Motion to Shorten Time to Hear Defendant's Rule 12 (h)(3) Motion to Dismiss ("Defendant's Ex Parte Motion"). On July 17, 1997, Plaintiff filed a Memorandum of Law in Opposition to Defendant's Rule

12(h)(3) Motion to Dismiss ("Plaintiff's Opposition to Defendant's Motion to Dismiss") . On July 28, 1997, Defendant filed a Reply to Plaintiff's Opposition to Rule 12(h)(3) Motion to Dismiss. On September 10, 1997, the Court denied Defendant's Ex Parte Motion and indicated it would rule on Defendant's Motion to Dismiss without a hearing, pursuant to Local Rule 220-2(d). For the reasons set forth below, Defendant's Motion to Dismiss is GRANTED.

Defendant moves the Court for an order setting aside the jury's verdict on Plaintiff's claim of retaliatory employment termination, due to the Court's lack of subject matter jurisdiction over that claim stemming from Plaintiff's failure to include that claim in his EEO complaints filed with the NPS. Defendant's Motion to Dismiss is based on Fed. R. Civ. P. 12(h)(3) , which permits dismissal of an action or claim at any time when it appears that the Court lacks jurisdiction over the subject matter thereof. Defendant's Motion is properly before the Court because "[i]t is elementary that the subject matter jurisdiction of the district court is not a waivable matter and may be raised at anytime by one of the parties, by motion or in the responsive pleadings, or *sua sponte* by the trial or reviewing court." *Emrich v. Touche Ross & Company* 846 F.2d 1190, 1194 n.2 (9th Cir. 1988) (citations omitted); *see also Carlisle v. U.S.*, ___ U.S. ____, 116 S. Ct. 1460, 1470 (1996) (Ginsburg, J., concurring) (defining "subject matter jurisdiction" as the "authority [of the court] to adjudicate the type of controversy involved in the action"; quoting *Restatement (Second) of Judgments* § 11 (1982)).

Defendant raised the jurisdictional issue with respect to Plaintiff's failure to include a claim of retaliatory termination in any of his EEO complaints submitted to the NPS twice before, in

Defendant's Motion for Summary Judgment, filed February 12, 1996, and in Defendant's Motion for Summary Judgment Regarding Plaintiff Nakamura's Retaliation Claim, filed December 12, 1996. In an order filed on February 20, 1997, which involved six separate pre-trial motions filed by Defendant, the Court stated that Plaintiff's failure to file a separate EEO complaint for retaliatory termination, or to amend his previous complaints to include that claim, did not preclude Plaintiff from pursuing his termination based on retaliation claim in this Court. (February 20, 1997 Order at 25.)

The Court based its February 20, 1997 holding on the Ninth Circuit's holding in *Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990), that federal courts have jurisdiction to hear incidents of discrimination not included in an EEO charge if they are "'like or reasonably related to the allegations contained in the EEOC charge.'" *Sosa*, 920 F.2d at 1456 (quoting *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1475-76 (9th Cir.1989)) (further citation omitted). In an abundance of caution based upon the complex and confusing factual allegations in the record before the Court and a liberal interpretation of Plaintiff's EEO complaints, the Court did not dismiss Plaintiff's retaliatory termination claim at that time. *Id.* Defendant requests that the Court revisit its February 20, 1997 ruling because the jury trial on Plaintiff's claims "sheds light on the factual issues surrounding the jurisdictional issue." (Defendant's Motion to Dismiss at 2.)

The Ninth Circuit has indicated that:

> [t]o establish federal subject matter jurisdiction, a plaintiff must exhaust his administrative remedies before filing a federal complaint. As we have

> explained, "'[t]he jurisdictional scope of a Title VII claimant's court action depends upon the scope of both the EEOC charge and the EEOC investigation.'" [A] district court [has jurisdiction over a claim not specified in the EEOC charge] if "that claim fell within the scope of the EEOC's actual investigation or an EEOC investigation which [could] reasonably be expected to grow out of the charge of discrimination."

Paige v. State of California, 102 F.3d 1035, 1041 (1996) (citing *EEOC v. Farmer Bros. Co.*, 31 F. 3d 891, 899 (9th Cir. 1994) (quoting *Sosa*, 920 F.2d at 1456) (further citation omitted)) In *Brown v. Pugent Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 730 (9th Cir. 1984), the Ninth Circuit held that:

> [w]here claims are not so closely related that agency action would be redundant, the EEOC must be afforded an opportunity to consider disputes before federal suits are initiated. Bypassing the administrative process under such circumstances frustrates the policy of encouraging informal conciliation and fostering voluntary compliance with Title VII.

After careful consideration of all of the documents and other evidence presented to this Court prior to and during trial, it is apparent that this Court did not have jurisdiction over Plaintiff's termination claim due to Plaintiff's failure to present that claim to the NPS despite his representation by counsel, his familiarity with the EEO process, and his filing of an EEO complaint after his termination which did not

raise a claim regarding (or even mention) his termination. Plaintiff did not produce any evidence, either in response to Defendant's motions or at trial, that he presented his claim of termination based on retaliation in any of the three formal EEO complaints and other numerous informal complaints that he submitted to the NPS. Plaintiff does not assert that he did raise his claim of retaliatory termination administratively. Plaintiff simply relies on *Sosa* and contends that:

> it is clear that having alleged co-worker and supervisory retaliation, Plaintiff was under no duty to amend his prior complaint and allege retaliatory termination, as such an adverse employment action was "like or reasonably related to[']the co-worker and supervisory retaliation which he suffered after February 1994.

(Plaintiff's Opposition to Defendant's Motion to Dismiss at 3.)

Applying the requisite inquiry set forth by *Paige* and *Sosa*, however, it is clear that Plaintiff is not entitled to raise his claim of retaliatory termination, which was not brought to the attention of the NPS, to seek judicial relief in this Court. Plaintiff's EEO complaints did not include a charge of retaliatory termination of Plaintiff (or any charge with respect to Plaintiff's termination), the EEO investigation did not include such a charge, and such a charge would not have reasonably been included in the investigation.

None of the formal or informal complaints submitted by Plaintiff to the EEO officers of the Park or the NPS included any mention of Plaintiff's termination, or his belief that he had been

terminated in retaliation for his engagement in protected activities. (See Defendant's Motion to Dismiss at Exhs. A-F, I.) Evidence presented to the Court by Plaintiff himself indicates that the EEO investigation conducted by the NPS with respect to Plaintiff's claims never included any inquiry into Plaintiff's September 1994 termination. Attached as an exhibit to one of Plaintiff's memoranda, is a letter from the EEO Director of the Department of the Interior to Plaintiff's counsel that describes the allegations contained in Plaintiff's EEO complaints that had been identified by the agency for processing. (*See* Plaintiff's Memorandum in Opposition to Defendant Bruce Babbitt's Motion to Dismiss Regarding Failure to Exhaust Administrative Remedies, filed January 9, 1997, at Exh. W.) This letter indicates that the agency did not investigate any claims by Plaintiff of retaliatory termination, but was limited to the following allegations made in Plaintiff's EEO complaints:

> FNP-94-104
>
> Mr. Nakamura was discriminated against on the basis of reprisal when he filed an informal complaint as a third party when he was bothered by statements from coworkers regarding the sexual and racial harassment by a Maintenance Supervisor at Haleakala National Park. (December 2, 1993)
>
> FN. 94 -125
>
> Mr. Nakamura was discriminated against on the basis of reprisal when he received a harassing telephone call from Chief of Maintenance, who threatened to

place him on absent without leave status (AWOL). (May 26, 1994)

FNP-95-073

Mr. Nakamura was discriminated against on the basis of reprisal when he received an unfair performance appraisal from a supervisor who was allegedly smoking marijuana. (September 16, 1994)

Id.

Plaintiff did not allege or present any evidence that he attempted to amend any of his EEO complaints to raise a claim of retaliatory discharge, despite Plaintiff's ample opportunity to make such an amendment. The final EEO complaint submitted by Plaintiff to the agency, containing the allegation that Plaintiff was retaliated against on September 16, 1994 when he received an unfair performance appraisal, is dated January 24, 1995. (Defendant's Motion to Dismiss at Exh. D.) This final complaint was not submitted until approximately three months after Plaintiff's termination on September 30, 1994, and it is limited to a performance evaluation Plaintiff received after the September 9, 1994 termination notification and an allegation that his evaluating supervisor had been using drugs on the job. (*Id.*) Although Plaintiff's January 24, 1995 complaint mentioned that other employees had been terminated or left the Park, Plaintiff did not mention his own termination let alone inform the agency that he believed his termination resulted from unlawful retaliation.

In light of Plaintiff's failure to present his claim of retaliatory termination to the NPS, despite his filing of an EEO complaint with the agency after his termination which dealt with events occurring after Plaintiff had received notice of his termination, the Court holds that the EEO investigation would not have reasonably included within its scope such a claim. An investigation of Plaintiff's claims regarding incidents that occurred while Plaintiff was still employed by the Park, many of which were resolved informally, would not encompass his subsequent claim (not raised until he filed this suit) that he was ultimately terminated because of unlawful retaliation. *Green*, 883 F.2d at 1476.

Plaintiff's EEO complaints involved claims of co-worker harassment and retaliation by his supervisors in failing to grant him requested leave, placing him on AWOL status, failing to timely credit him with the annual leave received as part of an informal resolution agreement, and giving him an unfair performance evaluation. Plaintiff's claim, first raised in this suit, that he was terminated based on retaliation is not so similar to his other claims of supervisor and co-worker retaliation that one would reasonably expect the agency's investigation of those claims to include an inquiry into possible retaliatory motives behind his termination. The agency's investigation of the allegations raised in Plaintiff's EEO complaints would also not make a separate inquiry into his subsequent retaliatory discharge claim redundant. Plaintiff's termination was a separate and discrete act that Plaintiff was obligated to present to the agency in a timely EEO complaint or by amending his previously filed complaints, if he believed that his termination was the result of unlawful discrimination. *See Grimes v. City and County of San Francisco*, 951 F.2d 236, 238-39 (9th Cir. 1991) (reaffirming the Ninth Circuit's view that "the

continuing violations doctrine does not apply to employee termination cases").

In *Ong v. Cleland*, 642 F.2d 316 (9th Cir. 1981), the Ninth Circuit held that a claim of constructive discharge was not reasonably related to a charge of discrimination in promotion. The *Ong* court based its holding on the fact that:

> [t]he issue of Ong's disability retirement and particularly, whether it was proximately caused by the agency's promotional decision was not presented administratively. The agency was therefore not given the opportunity to consider this issue before initiation of the Title VII suit. The failure to raise an issue administratively subverts the procedures and policies of Title VII and justifies precluding its presentation in federal court.

Ong, 642 F.2d at 320. The Court holds that, as in *Ong*, Plaintiff's failure to raise the termination issue administratively deprived the NPS of the opportunity to consider this issue and thereby subverted Title VII's policy of encouraging informal conciliation of employment discrimination suits. The Court notes that many of the claims Plaintiff did bring administratively were resolved by way of this informal conciliation process, including the Park's invalidation of the performance appraisal complained of in Plaintiff's January 1995 complaint and its entry into the February and April 1994 informal resolution agreements with Plaintiff.

Plaintiff argues that Defendant's alleged failure to comply with the 180-day time period for conducting a full investigation of Plaintiff's numerous EEO complaints, pursuant to 29 C.F.R. § 1614.106(d)(2), excuses Plaintiff's failure to file an EEO complaint alleging retaliatory termination. (Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 2.) Plaintiff's contention is unavailing.

First, the Court notes that Plaintiff's Complaint in this suit was filed in this Court on March 28, 1995, long before 180 days had passed since the filing of Plaintiff's final EEO complaint dated January 24, 1995. Second, the relief Plaintiff seeks does not logically follow from the conduct alleged. The failure of the NPS to issue a report within 180 days of the filing of Plaintiff's other EEO complaints involving separate claims, does not excuse Plaintiff from the requirement of filing an EEO complaint with respect to his retaliatory termination claim. As noted above, many of Plaintiff's other EEO claims were resolved informally within 180 days after they were brought to the agency's attention. It would be pure speculation for the Court to hold that because a final NPS decision was not issued within 180 days of each EEO complaint filed by Plaintiff, that, had Plaintiff filed an EEO complaint alleging retaliatory termination, the agency would have failed to fully investigate that claim or file a final decision within 180 days. This was not a situation where the agency refused to allow Plaintiff to amend his prior EEO complaints or engaged in affirmative misconduct to lull Plaintiff into inaction. *See, e.g., Albano v. Schering-Plough Corp.*, 912 F.2d 384 (9th Cir. 1990). Plaintiff

simply did not raise his claim of retaliatory termination with the NPS,[5] despite his familiarity with the EEO process and representation by experienced counsel, and thereby deprived the agency of the opportunity to investigate that claim.

Even if the Court could excuse Plaintiff's failure to present his retaliatory termination claim to the NPS, the Court finds that Plaintiff would not be entitled to any equitable relief from this failure. As noted above, this was not a case where agency misconduct caused Plaintiff to miss the statutory deadline for filing an EEO complaint of retaliatory termination. Plaintiff simply failed to present that claim administratively in any manner, timely or untimely. Moreover, the Ninth Circuit's doctrine of liberally construing Title VII complaints and not applying Title VII's procedural requirements too mechanically is based, at least in part, on the recognition that laypersons generally initiate the administrative process for resolving employment discrimination complaints. *Greenlaw v. Garrett*, 59 F.3d 994, 999 (9th Cir. 1995) (citing *Ong*, 642 F.2d at 319) (additional citations omitted).

Since May 1994, Plaintiff has been represented by an attorney who has worked on Title VII employment discrimination cases since the early 1970s. (*See* Aff. of Clayton C. Ikei, attached to Plaintiff

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[5]*See Macy v. Dalton*, 853 F. Supp. 350, 357 (E.D. Cal. 1994) (explaining that "[i]n the context of Title VII, the jurisdictional presentment requirement is met when the employee/ plaintiff presents her claims to the employer/agency or an appropriate administrative review body such as the MSPB or EEOC, even if the claims are not timely presented. However, the presentment requirement is not met and the court lacks jurisdiction when the plaintiff's claims have never been presented for agency or administrative review.") (citations omitted).

Nakamura's Motion for Order Granting an Award of Attorney's Fees and Costs of Litigation, at ¶ ¶ 2-3, 5-6 and Exh. C thereto.) Moreover, Plaintiff's trial testimony indicated that Plaintiff's counsel played a role in the composition of Plaintiff's EEO complaints filed with the agency. Plaintiff's counsel sent the NPS EEO office a letter on May 31, 1994, informing the agency that he was representing Plaintiff with respect to his retaliation claims against the Park. (Plaintiff's Memorandum in Opposition to Defendant Bruce Babbitt's Motion to Dismiss Regarding Failure to Exhaust Administrative Remedies, filed January 9, 1997, at Exh. S.) On November 22, 1994, approximately two months after Plaintiff was terminated, Plaintiff's counsel sent another letter to the agency requesting consolidation of Plaintiff's two prior EEO complaints and that the agency issue an immediate decision thereon, but that letter did not mention Plaintiff's termination or any allegation of retaliation with respect to his termination. (*Id.* at Exh. V).

The Court holds that given Plaintiff's representation by counsel and repeated contact with the agency both before and after his termination, no reasonable EEO investigation would have included a claim that Plaintiff's termination was retaliatory because such a claim was never mentioned, let alone formally presented, by Plaintiff or his attorney prior to the filing of this suit. Plaintiff's claim of retaliatory termination is not so closely related to his other claims of retaliation that agency action in investigating that claim would have been redundant. *Brown*, 732 F.2d at 730. The Court finds that Plaintiff is not entitled to equitable relief for his failure to present his termination claim to the NPS, and that Plaintiff is precluded from bringing that claim before this Court.

In accordance with the foregoing, Defendant's Motion to Dismiss is GRANTED. Plaintiff's failure to present his retaliatory termination claim to the NPS and to exhaust his administrative remedies with respect to that claim, deprives this Court of subject matter jurisdiction over that claim. *See* Paice, 102 F.3d at 1041; *Macy*, 853 F. Supp. at 356-57; *see also Hashimoto v. Dalton*, 118 F.3d 671, 678-79 (9th Cir. 1997) (holding that district court did not have jurisdiction over a discriminatory termination claim not raised administratively before the Merit Systems Protection Board). The jury's verdict on Plaintiff's retaliatory termination claim (Claim Two) must be set aside because Plaintiff's failure to present that claim administratively precludes Plaintiff from raising that claim in this Court.

II. DEFENDANT'S RENEWED RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW[6]

On June 17, 1997, the conclusion of Plaintiff's case-in-chief, Defendant moved for judgment as a matter of law and submitted a detailed written Rule 50 Motion for Judgment as a Matter of Law ("Defendant's Rule 50 Motion"). Defendant asserted in his Rule 50 Motion that, *inter alia*, Plaintiff had failed to offer evidence legally sufficient for a jury to find that Defendant's proffered budgetary reason for terminating Plaintiff was a pretext for retaliation against Plaintiff due to his EEO activities. (Defendant's Rule 50 Motion at

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[6]Although the result of the Court's ruling on Defendant's Motion to Dismiss is that the jury's verdict on Claim Two is set aside, the Court addresses the merits of Defendant's Renewed Rule 50 Motion for Judgment as a Matter of Law to show that, even if the Court did have jurisdiction over Plaintiff's retaliatory termination claim, Defendant would still be entitled to judgment as a matter of law on that claim.

11-13.) The Court stated that it would take Defendant's Rule 50 Motion under advisement until the conclusion of Defendant's case.

At the conclusion of Defendant's case, Defendant renewed his Rule 50 motion and Plaintiff made an oral Rule 50 motion, both of which the Court took under advisement. The parties made their closing arguments and the case was submitted to the jury. The jury returned a verdict in favor of Defendant on the leave-incident retaliation claim (Claim One) and the retaliatory hostile work environment claim (Claim Three), and in favor of Plaintiff on the retaliatory employment termination claim (Claim Two). Both Defendant and Plaintiff renewed their Rule 50 motions and the Court ordered both parties to submit written Rule 50 Motions within 10 days, with opposing memoranda due 10 days thereafter.

On July 7, 1997, Defendant lodged a Renewed Rule 50 Motion for Judgment as a Matter of Law ("Defendant's Renewed Rule 50 Motion"). On July 17, 1997, Plaintiff submitted a Memorandum in Opposition to Defendant's Renewed Rule 50 Motion ("Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion") . On July 28, 1997, Defendant filed a reply to Plaintiff's Opposition ("Defendant's Reply") . On July 31, 1997, Plaintiff filed, without leave of the Court, a pleading styled as a Supplemental Memorandum of Law in Opposition to Defendant's Rule 50 Motion ("Plaintiff's Supplemental Memorandum"). On August 7, 1997, Defendant filed a pleading styled as a Supplemental Reply Memorandum Re Defendant's Renewed Rule 50 Motion ("Defendant's Supplemental Reply"). On August 18, 1997, the Court granted Defendant's request to file Defendant's Supplemental Reply pursuant to Local Rule 220-4. The Court has reviewed and considered both Plaintiff's Supplemental Memorandum

and Defendant's Supplemental Reply in ruling on Defendant's Renewed Rule 50 Motion.

A. APPLICABLE LAW AND STANDARD OF REVIEW

In order to prevail on his claim of retaliatory employment termination, Plaintiff was first required to establish a prima facie case of retaliation. *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988). To establish such a case, Plaintiff was required to show that he "'engaged in a protected activity, that [he] was thereafter subjected by [his] employer to adverse employment action, and that a causal link exists between the two.'" *Id.* (quoting *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982)). The parties stipulated that Plaintiff had engaged in protected activity by filing EEO complaints. Plaintiff's termination constitutes an adverse employment action. *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3171 (July 29, 1997) (No. 97- 364).

The Ninth Circuit has indicated that the final causal link requirement:

> may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision."

Jordan, 847 F.2d at 1376 (citing *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (additional citations omitted)). Plaintiff engaged in several instances of protected activities. The parties stipulated that, as a result of Plaintiff's actions, a member of Congress requested that the U.S. Department of the Interior investigate claims of EEO violations at the Park, which investigation took place in April 1993. Park Superintendent, Donald Reeser, testified that he was aware of Plaintiff's involvement in generating the investigation. The parties also stipulated that certain management personnel of Defendant knew of four EEO complaints filed by Plaintiff in November 1993, February 1994, May 1994 and January 1995. Plaintiff was informed in a letter dated September 9, 1994, that he would be terminated effective September 30, 1994. The Court holds that the proximity in time between Plaintiff's engagement in protected activities, particularly his May 22, 1994 EEO complaint alleging supervisor retaliation, and his subsequent termination in September 1994 is sufficient circumstantial evidence for Plaintiff to fulfill the final requirement for his prima facie case. *See Yartzoff*, 809 F.2d at 1376.

Once Plaintiff's prima facie case is established, a presumption of discrimination is created, and the burden of production then shifts to Defendant to produce admissible evidence that Plaintiff's termination was taken "'for a legitimate, nondiscriminatory reason.'" *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). Defendant satisfied this burden by producing admissible evidence that Plaintiff was discharged due to budgetary considerations, not retaliation. Defendant offered evidence that Plaintiff's termination resulted from severe fiscal constraints surrounding the preparation of the fiscal year 1995 budget, which made the elimination of three

temporary maintenance employee positions necessary and that Plaintiff was terminated first due to the fact that he had claimed that he was unable to work at all, and already had been on indefinite requested leave for four months. As a result,

> [t]he presumption [of discrimination], having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his [engagement in protected activities].

Id. at 510-11 (citing *Burdine* , 450 U.S. at 253, 255).

Once Defendant produced this legitimate, nondiscriminatory reason, "in order to prevail, [Plaintiff] must demonstrate that [Defendant's] alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (quoting *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1985), *as amended*, 784 F.2d 1407 (1986)). Plaintiff

> "must do more than establish a prima facie case and deny the credibility of [Defendant's] witnesses." In response to the defendant's offer of nondiscriminatory reasons, the plaintiff must produce "specific, substantial evidence of pretext."

Wallis, 26 F.3d at 890 (citing *Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986); *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)) . As noted in *Hicks*, references "to proving or demonstrating simply 'pretext,' are reasonably understood to refer to the previously described pretext, *i.e.*, 'pretext for discrimination.'" *Hicks*, 509 U.S. at 515-16 (citing *Burdine*, 450 U.S. at 258) (footnote omitted).

In *Hicks*, the Court explicitly rejected the view that the factfinder's disbelief of Defendant's proffered reason compels a verdict for Plaintiff or that "if the plaintiff proves the asserted reason to be false, the plaintiff wins." *Id.* at 511, 515. The Court recognized that

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

Id. at 511 (emphasis added). The Court proceeded to clarify, however, that "a reason cannot be proved to be 'a pretext for discrimination, unless it is shown both that the reason was false, and that discrimination was the real reason." *Id.* at 515 (emphasis added). The Court emphasized that it is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination. *Id.* at 519. Both the *Burdine* and *Hicks* decisions stress that the plaintiff always retains the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. *Burdine*, 450 U.S. at 253; *Hicks*, 509 U.S. at 518.

In applying the controlling Supreme Court and Ninth Circuit Title VII case law set forth above, Plaintiff's burden at trial in order to prevail on his retaliatory termination claim becomes evident. Plaintiff was required to prove, by a preponderance of the evidence, that Defendant's budgetary reason for terminating Plaintiff was merely a pretext for Defendant's true reason for terminating Plaintiff in retaliation for having engaged in protected activities. The jury found that Plaintiff satisfied this burden and proved that he was terminated due to Defendant's unlawful retaliation. Defendant asserts that he is entitled to judgment as a matter of law pursuant to Fed. R. Civ. P. 50, because Plaintiff did not present sufficient evidence of pretext or retaliatory intent for a reasonable jury to find for Plaintiff on the termination issue.

> Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion and that conclusion is contrary to that of the jury.

Forrett v. Richardson, 112 F.3d 416, 419 (9th Cir. 1997) (citing *Bank of the West v. Valley Int'l Bank of Ariz.*, 41 F.3d 471, 477 (9th Cir. 1994)). In ruling on the motion,

> [t]he court may not assess the credibility of witnesses, resolve conflicting evidence, or otherwise substitute its conclusions for that of the jury. In order to rebut a motion for judgment as a matter of law, the non-moving party must present sufficient evidence in support of a material issue.

9 James Wm. Moore et al., *Moore's Federal Practice* § 50.03 (3d ed. 1997) (footnotes omitted).

> While the district court may not resolve conflicts in the testimony or weigh the evidence, it may evaluate evidence at least to the extent of determining whether there is substantial evidence to support the verdict. "[A] mere scintilla of evidence will not suffice."

Von Zuckerstein v. Argonne Nat'l Laboratory, 984 F. 2d 1467, 1471 (7th Cir. 1993) (citing *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984)). The Ninth Circuit has defined substantial evidence as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994) (citing *George v. City of Long Beach*, 973 F. 2d 706, 709 (9th Cir. 1992)).

The Supreme Court has indicated that, although the factfinder is responsible for deciding whether Defendant's stated reason is unpersuasive and that Plaintiff's proffered reason of unlawful discrimination is correct, "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *Hicks*, 509 U.S. at 524. The Court held that, in Title VII bench trials, the trial court's finding of discrimination is subject to appellate review under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a), and implied that jury findings of discrimination would be subject to standard trial court review under

Fed. R. Civ. P. 50 by stating that discrimination should not be treated any differently from other ultimate questions of fact. *Id.*

There does not appear to be any dispositive Ninth Circuit case on the proper standard of review to be applied by a district court in evaluating, under Rule 50, a jury's finding of discrimination in a Title VII pretext case. The Supreme Court's ruling in *Hicks* indicates, however, that it should be treated no differently than any other ultimate question of fact. *Id.* In a recent en banc decision, the Second Circuit conducted an in-depth analysis of *Hicks* and *Burdine* and interpreted those decisions as requiring the following standard of review:

> To summarize, we consider how district courts should analyze discrimination cases in which the plaintiff has advanced a prima facie case, the defendant has proffered an explanation capable of being found false, and a jury has found for the plaintiff. When should such a verdict be left in place, when set aside?
>
> The rule is that there is no rule peculiar to discrimination cases. As in all other areas, the answer depends on how forcefully the evidence has shown what plaintiff has the burden of showing — that the adverse employment action suffered by plaintiff was attributable to the alleged discrimination. If the evidence (and the inferences reasonably flowing from it) can demonstrate that the plaintiff was likely injured by the defendant's illegal discrimination, then the evidence gives rise to a jury issue, and a verdict in plaintiff's favor must be left undisturbed. If they

> cannot, and the jury is left to mere speculation, then the lack of evidentiary support compels the court to conclude that a mistake has been made. The court in those circumstances must find the plaintiff's verdict to be clearly erroneous and set it aside.

Fisher v. Vassar College, 114 F.3d 1332, 1346 (2d Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3178 (U.S. Sept. 2, 1997) (No. 97-404).

Accordingly, the Court analyzes the evidence presented at trial in the light most favorable to Plaintiff to determine whether there was specific, substantial evidence of pretext to support the jury's verdict that Defendant did not terminate Plaintiff for budgetary reasons, but in retaliation for his EEO activities.

B. SUFFICIENCY OF THE EVIDENCE

As indicated above, at trial Plaintiff had the burden of proving both that Defendant's proffered reason for terminating Plaintiff was false and that unlawful retaliation was the real reason. *Hicks*, 509 U.S. at 515; *Nidds*, 113 F.3d at 918 n.2. These two elements are analyzed separately below.

1. Evidence of Pretext

Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion identifies several alleged pieces of evidence presented at trial that Plaintiff claims support a reasonable finding of pretext by the jury.

a. Reeser's allegedly equivocal testimony regarding the amount of, and his control over, the 1995 Park Budget

Plaintiff claims that Reeser was initially "equivocal" as to the amount of the Park's operating budget and his role in the formulation and control of that budget. (Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion at 4.) Although it is unclear from Plaintiff's memorandum, Plaintiff apparently contends that Reeser's alleged equivocality on these points could cause a reasonable jury to find Reeser's testimony regarding Defendant's termination not credible, and infer therefrom that the true reason was unlawful retaliation.

Reeser was not equivocal in his testimony regarding the amount of the 1995 budget. Reeser initially responded to Plaintiff's counsel's question regarding the amount of the Park's 1995 budget by giving an approximate figure of $550,000, but that answer was quickly corrected to an approximate figure of $2.2 million after clarification that the question pertained to the budget for the entire Park and not just the maintenance division. There was no equivocation in Reeser's response. The two separate answers resulted from an initial misunderstanding of the question. Although Reeser later stated after further questioning that the amount of the budget may have been as high as either $2.3 million or $2.4 million, he indicated that he could only give an approximate figure from memory and would have to check the records if a precise figure was needed.

Plaintiff's contention that Reeser was equivocal as to his role in formulating and controlling the budget is also inaccurate. The

circuitous questioning on this issue was a result of either Plaintiff's counsel's apparent misunderstanding of, or dissatisfaction with, Reeser's answers regarding his role in overseeing the Park's budget vis-à-vis the funding levels approved by Congress and the proposed budgets submitted to him by the Park's division chiefs. The Court did not find Reeser to be at all equivocal in his testimony regarding the 1995 budget. Reeser answered Plaintiff's counsel's repeated questions on this issue in a straightforward and consistent manner.

In ruling on Defendant's Renewed Rule 50 Motion, the Court does not, and may not, make a credibility determination regarding Reeser's testimony. The Court does note, however, that Plaintiff's assertion that Reeser was "equivocal" in his answers regarding the amount of the Park's 1995 budget and his role in preparing that budget is a mischaracterization of both the record and the proceedings in this matter. Even if there had been something in Reeser's testimony that the jury could have found equivocal regarding the amount of the Park's operating budget and his role in planning and controlling that budget, that still would not constitute specific, substantial evidence from which a reasonable jury could infer that Defendant's proffered reason for terminating Plaintiff was a mere pretext for unlawful retaliation. As discussed below, Defendant produced ample uncontradicted documentary evidence from the time in question supporting Defendant's budgetary reason for terminating Plaintiff.

b. Reeser's alleged reduction of the maintenance division's budget by $50,000 without written verification.

Plaintiff asserts that[:]

> Don Reeser further testified that he reduced the budget of the Maintenance division by $50,000 as a result of the retirement of David Puu despite his admission that he had not received any written verification that his overall funding would be reduced by $50,000 by his superiors.

Id. at 4-5. Again, Plaintiff's memorandum misrepresents the testimony presented at trial.

Reeser testified that it was NPS policy that once an employee, like Puu, opted for the early retirement buyout program, the salary and benefits from that position would be lost unless the position was filled by a transfer from a central NPS office. Defendant produced copies of e-mail messages from NPS headquarters that were sent to the Park in March and April 1994, which clearly indicate that for every buyout accepted, a full-time employee position must be cut as well as the associated salary. (Defendant's Exhs. 519 & 520.) The expected loss of $50,000 by the Park's maintenance division due to Puu's buyout was determined by policy set by NPS headquarters in Washington, not by Reeser. As indicated in Defendant' s exhibits and by the testimony of Harry, this NPS policy reflected the requirements of the "buyout bill" passed by Congress and signed by President Clinton, the goal of which was to help contribute to a massive downsizing of the entire federal bureaucracy.

Reeser testified that based on the documents and information that he received from his NPS superiors, in mid-August 1994 he told

Lucero to anticipate a loss of $50,000 from the maintenance division's budget as a result of Puu's buyout. Reeser further testified that in preparing the proposed division budgets for the 1995 fiscal year beginning September 30, 1994, the Park was operating in anticipation that a Continuing Resolution of Congress would go into effect in October 1994 and freeze expenditures at 1994 fiscal year levels despite cost increases. Lucero testified that in preparing the 1995 budget in September 1994, he was told to operate under the assumption that the maintenance division would receive the same funding allocation as in 1994, less $50,000 for Puu's buyout. This reduction in funds was expected to occur despite cost increases and the arrival of Perkey, a permanent maintenance employee who had transferred from another National Park, which further reduced the amount of funds available to hire temporary employees. Harry also testified regarding the NPS budget process, the situation regarding the buyout program, the expenditure freeze in fall 1994, and that, pursuant to federal civil service regulations, temporary employees must be terminated in times of financial constraints before permanent employees. Reeser testified that from 1988 to 1994, numerous temporary employees were let go by the Park for financial reasons. Defendant produced ample documentary evidence supporting the testimony of Reeser, Lucero, and Harry. (*See*, e.g., Defendant's Exhs. 519-21, 525, 527-28, 531-533.) Plaintiff did not offer any evidence or elicit any testimony to contradict this documentary evidence or to create any reasonable doubt as to its validity.

Lucero testified that the budgetary figure he was given to work with, resulting from all of the above factors, meant that he would have to eliminate a total of three temporary maintenance employee positions in fiscal year 1995. Lucero decided to terminate Plaintiff,

Havelin, and Korn. Lucero stated that there was enough money in the proposed fiscal year 1995 budget to continue to fund two temporary maintenance employee positions for the first four pay periods of fiscal year 1995. Plaintiff had been on indefinite leave from work since May 1994 and had not indicated the precise date, if ever, that he would be able to return to work. A letter from Plaintiff's doctor (Plaintiff's Exh. 40) and a leave application submitted by Plaintiff (Plaintiff's Exh. 89) both indicated that Plaintiff was unable to work and that it was undetermined when, if ever, Plaintiff would be able to return to work. (*See also* Plaintiff's Exh. 39.)

Lucero testified that he budgeted to use the limited amount of money he had for temporary employees to keep Korn and Havelin on for four pay periods each until the funds ran out in November 1994. Lucero decided to terminate Plaintiff effective September 30, 1994, as there was no reason to keep Plaintiff on the payroll for the beginning of fiscal year 1995, as he did with Korn and Havelin, because Plaintiff was still on indefinite requested leave, had not been to work since May, and did not indicate when, if ever, he would be able to return. Lucero and Reeser both testified that the temporary position that Plaintiff had held was never filled after he was terminated because they did not have the money to do so.

Even if the jury found Lucero's and Reeser's testimony to be not credible, there was still ample documentary evidence in the record from the time in question supporting Defendant's proffered budgetary explanation. Plaintiff produced no evidence or testimony to dispute that Korn and Havelin were sent termination notices, dated October 17, 1994, indicating that they would be terminated due to lack of funds as of November 12 and November 26, 1994, respectively. (Defendant's

Exhs. 531-32.) Proposed budget documents from September 1994 clearly show that funding for Korn and Havelin's positions was expected to end in November 1994. (Defendant's Exh. 528.) Memoranda sent from Lucero to Reeser in September and October 1994 indicate that Lucero was very concerned that the terminations of Korn and Havelin in November 1994 would leave him with too few workers to effectively run the maintenance division. (Defendant's Exhs. 525 & 533.)

Plaintiff failed to present any evidence or elicit any testimony to contradict these items of documentary evidence that support Defendant's proffered budgetary explanation for Plaintiff's termination. Reeser's uncontradicted trial testimony revealed that he did not "reduce" the maintenance division budget by $50,000, but merely informed Lucero that his budget would be reduced by that amount because the written notices received from NPS headquarters clearly indicated that Puu's buyout would result in such a reduction by law. Plaintiff's aforementioned mischaracterization of the record regarding the expected budget reduction does not constitute specific, substantial evidence of pretext, especially in light of the ample uncontradicted documentary evidence supporting the testimony of Reeser, Lucero, and Harry on this issue.

c. Retention of Korn and Havelin Past Their Expected November 1994 Termination Dates

Plaintiff also claims that:

> Mr. Reeser further testified that he permitted Pete Lucero to keep two temporary maintenance workers on the job, after their proposed termination dates. Mr. Lucero did not receive written verification that their funding was not taken away by his superiors until December 1994, months after their funding was expected to cease.

(Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion at 5.) Contrary to Plaintiff's assertion, the uncontradicted trial testimony of Reeser and Lucero indicated that Lucero, not Reeser, made the decision to retain Korn and Havelin beyond their proposed termination dates in November 1994.

Lucero testified that he did not terminate Korn and Havelin as scheduled in November, because after the start of the 1995 fiscal year on October 1, 1994, and after Plaintiff had already been terminated, it was discovered that Washington did not remove the $50,000 from Puu's buyout from the Park's budget as expected. Defendant produced uncontroverted written documentation that, as late as October 20, 1994, Korn and Havelin were still expected to be terminated in November 1994. (Defendant's Exh. 533; *see also* Defendant's Exhs. 531 & 532.)

Reeser testified that up to November 1994, the Park was trying to fill Puu's position by recruiting a NPS employee to transfer from a central NPS office, in order to save the $50,000 from Puu's buy-out, but that the effort was unsuccessful. Reeser testified that he then heard

from an NPS official in Honolulu that the $50,000 had not been taken out of the 1995 fiscal year budget. Reeser testified that he was afraid to ask for confirmation of this from NPS headquarters for fear of losing the money. Once it appeared that the money from Puu's buyout had not been removed from the Park's account, there was no longer any need for Lucero to terminate Korn and Havelin. The maintenance division was severely understaffed and Lucero needed all the employees that his budget would allow. (See Defendant's Exhs. 525 & 533.)

Plaintiff's position appears to be that there was no notification to the Park prior to December 1994 that the funds from Puu's buyout had not been removed from the budget. Although it was not until December 1994 that Reeser received written confirmation from Washington that Puu's buyout had never been recorded at NPS headquarters and that the money should still be in the Park's account, Plaintiff presented no evidence to contradict Reeser's explanation that he had heard previously from NPS officials that the funds would not be lost. The contents of the e-mail message from Karen Nussbaum clearly indicate that she had been discussing the buyout situation with Reeser's office prior to that written confirmation. (Defendant's Exh. 534.)

Plaintiff presented no evidence to contradict Reeser's and Lucero's testimony and Defendant's written documentation regarding the expected terminations of Korn and Havelin, and subsequent decision by Lucero to keep them on once it became apparent that the expected $50,000 deduction from the budget did not occur due to an administrative oversight at NPS headquarters. Plaintiff maintains that

> [c]learly, the jury found that the testimony of Don Reeser was incredulous [sic] on his lack of funding for Plaintiff's continued [sic], and his actions manipulative to achieve the termination of Plaintiff from his National Park Service employment.

(Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion at 5.)

Plaintiff must do more than deny the credibility of Defendant's witnesses — he must produce substantial, specific evidence of pretext. *Wallis*, 26 F.3d at 890. Plaintiff failed to produce any such evidence. In light of that failure, no reasonable jury could have simply chosen not to accept the ample uncontradicted documentary and testimonial evidence presented by Defendant to explain why Korn and Havelin were not terminated for budgetary reasons as initially expected. Plaintiff's position requires belief that Reeser and Lucero orchestrated an elaborate manipulative scheme back in 1994, which involved (1) drafting proposed budgets based on phony numbers, concocted resolutions of Congress, and intentional administrative oversights at NPS headquarters in Washington, and (2) the mailing of fake termination letters to two other temporary Park employees. All of these actions would have been designed to create a pretextual budgetary explanation for Plaintiff's termination in anticipation of a subsequent suit by Plaintiff. Plaintiff's failure to present any evidence to contradict Defendant's documentary evidence leaves Plaintiff with more than this elaborate explanation of the evidence outlined above, which no reasonable jury could accept.

d. Lucero's alleged decision to retain Korn rather than Plaintiff

Plaintiff's next argument in support of a finding of pretext with respect to Defendant's proffered budgetary explanation is as follows:

> In light of the fact that Pete Lucero clearly decided to terminated [sic] Plaintiff, a maintenance worker with an [sic] commendable work performance record, and decide instead to offer employment to a known drug user, as well as his previous efforts and statements to not permit Plaintiff to go on the park site or to obtain future employment, it is clear that the jury found that Pete Lucero terminated Plaintiff's employment for retaliatory and not budgetary reasons.

(Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion at 5-6.) Some of the evidence cited by Plaintiff in support of this argument involves an inaccurate statement of the record, and the remaining evidence that is cited accurately does not support the conclusion Plaintiff draws from it in light of all of the evidence presented.

First, although it was not disputed that Korn was suspended for smoking marijuana on Park property in July 1994, Plaintiff erroneously claims that Korn's drug use occurred while on duty, which conflicts with the testimony presented at trial. Second, Plaintiff's counsel misrepresents the record in claiming that Lucero "clearly decided" to terminate Plaintiff and decided instead to "offer employment to a known drug user." *Id.* at 5. Lucero testified that, in preparing his

proposed budget for fiscal year 1995, he realized he would have to terminate three temporary workers for lack of funds. He decided to terminate Plaintiff, Korn, and Havelin. The transfer to the Park of permanent maintenance worker Perkey, the expected loss of $50,000 from Puu's buyout, the Congressional expenditure freeze, and cost increases meant that three temporary maintenance workers would have to be terminated. Harry testified that, consistent with the NPS, understanding of federal civil service regulations, temporary federal employees must be removed prior to permanent employees when lay-offs and terminations are necessary. Harry explained that permanent employees take precedence over temporary employees under federal civil service regulations.

Lucero explained why Plaintiff was the first temporary employee terminated at the end of the 1994 fiscal year — because Plaintiff had been on indefinite leave from work since May 1994 and had indicated that it was not clear when, if ever, he would be returning to work. Plaintiff did not present any evidence to contradict Lucero's testimony that Plaintiff had never informed Lucero or anyone else that he was ready to return to work, and that it was not Park policy to call employees who were out on approved leave for stress to see when they would be returning to work. Lucero testified that he used the limited funds he had for temporary employees to fund Korn's and Havelin's positions for four pay periods until that money ran out in November 1994, and that it would have been fruitless to fund Plaintiff's position f or that period in the beginning of fiscal year 1995 because Plaintiff had requested and was currently on indefinite leave.

Contrary to Plaintiff's assertion, the uncontradicted testimony and documentary evidence presented at trial indicated that it was not

until after Plaintiff's termination in September 1994, that Lucero was informed that the $50,000 from Puu's buyout was not taken out of the Park's account due to an oversight at NPS headquarters. Lucero did not, therefore, decide to terminate Plaintiff and instead offer employment to Korn. The decision to terminate all three had been announced, and Plaintiff had already been terminated, when Lucero realized that he would be able to use the $50, 000. Korn and Havelin were still working at that time, and it was no longer necessary to terminate them for lack of funds.

Plaintiff's other assertions in his opposition to Defendant's Renewed Rule 50 Motion do not constitute specific, substantial evidence of pretext. Defendant never disputed the fact that Plaintiff's work performance was good. Budget considerations, and not work performance, was the reason Defendant gave for Plaintiff's termination. Plaintiff also stresses the fact that Korn had been caught smoking marijuana. It was undisputed, however, that Korn was disciplined and suspended for doing so, and Lucero testified that it would not be fair, and would be against Park policy, to further punish an individual once a punishment had been chosen and completed.

Plaintiff's reliance on the aforementioned evidence is unavailing, because it does not support a reasonable finding of pretext. The evidence presented at trial indicated that Lucero did not choose to Korn over Plaintiff, because Lucero was never faced with such a choice. Plaintiff had already been terminated and Korn was still working at the Park when it was discovered that the money was not removed from the Park's account. Plaintiff and his doctor had indicated that Plaintiff was unable to work until further notice, and had never informed Lucero or anyone else that he was able to return. It

became unnecessary to terminate Korn and Havelin once the funds were discovered, and Lucero chose not to do so because, as his aforementioned memoranda to Reeser expressed, the maintenance division was severely understaffed and he needed all the workers that his budget would allow him to employ.

Plaintiff failed to show that he was treated differently than any other similarly situated employee with respect to his termination. Testimony was presented that numerous temporary employees were let go by the Park between 1988 and 1994 due to financial considerations. Plaintiff was the only temporary maintenance employee not included in the 1995 fiscal year budget because he was the only employee who had been out on requested leave for the last four months of fiscal year 1994 and had indicated that he would be out indefinitely. Plaintiff did not produce any evidence that any other temporary maintenance worker terminated for lack of funds was re-hired, or that Defendant filled Plaintiff's position after his termination. Defendant's budgetary explanation was supported by both testimony and documents drafted during the time period in question. Plaintiff failed to present any evidence to cast doubt on Defendant's proffered explanation of why Plaintiff was terminated while the planned terminations of Korn and Havelin were not carried out.

Plaintiff identifies two additional pieces of evidence to support his claim that the jury could have reasonably found Lucero's proffered explanation to be pretextual. *Id.* Plaintiff points to a single line in a memorandum from Lucero to Reeser drafted after Plaintiff had already been terminated. (Defendant's Exh. 525.) When read in its entirety, no reasonable jury could have concluded that the memorandum evinces a retaliatory motive by Lucero in firing Plaintiff.

The gist of the memorandum is that under staffing in the maintenance division had resulted in stress and strain during fiscal year 1994, and that Lucero did not want to repeat that stressful situation in fiscal year 1995 by reducing the maintenance staff even more. Rather than support Plaintiff's claim of retaliation, Defendant's Exhibit 525 constitutes strong evidence in support of Defendant's budgetary explanation for Plaintiff's termination, which Plaintiff did not present any evidence to contradict.

Finally, Plaintiff alleges that "Lucero further testified that he sought unsuccessfully to bar Plaintiff's entry upon the National Park Service facility." (Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion at 5.) Plaintiff's Memorandum again misrepresents the testimony presented at trial. Lucero testified only that he contacted a Park protection ranger, Phil Dendel ("Dendel") on May 26, 1994, after Plaintiff became extremely upset and kicked a NPS vehicle. Plaintiff had become upset because a co-worker did not cover for Plaintiff by pumping out Jet Johns while Plaintiff was off on leave for stress. Lucero told Plaintiff not to worry about it and that Lucero would have it done the following day, Plaintiff's day off.

Lucero testified that he contacted Dendel because he was concerned about the safety of visitors and the maintenance crew if Plaintiff should snap. Lucero also testified that Plaintiff had previously expressed to Lucero on May 19th that he was upset enough to hurt somebody. Plaintiff's own witness, Audrey Cordeiro, testified that Plaintiff had told her he needed to leave work on May 26th before he hurt someone. In Lucero's notes prepared on May 26th, Lucero states that he contacted Dendel to inform him that the maintenance staff would be monitoring Plaintiff's behavior because of Plaintiff's

references to violence and Lucero's safety concerns, and to ask Dendel to alert his staff to do the same. (Plaintiff's Exh. 34.)

Even if Lucero's and Cordeiro's testimony that Plaintiff had made threats of hurting someone was not believed by the jury, Plaintiff presented no evidence from which the jury could reasonably infer that Lucero contacted Dendel to retaliate against Plaintiff for his prior EEO activity. None of the EEO complaints Plaintiff had made up to that point were against Lucero. Lucero did not arrive at the Park until October 1993, months after the NPS investigation regarding Puu's conduct, and that investigation and Plaintiff's complaint of retaliation filed thereafter did not involve or reflect on Lucero in any way. Plaintiff was already on approved intermittent status and had been offered work since September 30, 1993, when Lucero arrived at the Park in October 1993. Plaintiff did not begin to work under Lucero until late March 1994. Plaintiff did not provide any evidence that would allow a reasonable inference that Lucero contacted Dendel to retaliate against Plaintiff for his prior EEO activity, rather than out of safety concerns or because Lucero was angry with Plaintiff over their encounter earlier that day.

In response to Lucero's nondiscriminatory budgetary explanation for terminating Plaintiff and why the planned terminations of Korn and Havelin were never carried out, Plaintiff was required to produce specific, substantial evidence of pretext. *Wallis*, 26 F.3d at 890. Plaintiff did not do so. Instead, Plaintiff relies on inaccurate characterizations of the record and evidence which does not support a reasonable finding of pretext. Once again, Plaintiff has failed to identify any specific evidence of pretext.

e. Cordeiro's testimony reagarding the budget

Plaintiff's final offer of trial evidence to support a reasonable finding of pretext is Cordeiro's testimony regarding the budget. During 1993 and 1994, Cordeiro was a Park administrative assistant whose responsibilities included handling of budgetary and financial matters. Cordeiro was not designated as an expert witness, and only testified as a lay witness with personal knowledge related to budgetary matters at the Park. Cordeiro was on maternity leave from approximately October 1994 through June or July 1995. She did not provide any testimony specifically related to the 1995 fiscal year budget. Plaintiff describes the following areas of Cordeiro's testimony as supportive of a finding of pretext:

> Regarding her work on the budget, Ms. Cordeiro testify [sic], without contradiction, that she reconciled the budgets, was responsible to insure that expenditures did not exceed budget [sic] and that Haleakala's expenditures stayed within allocated amounts.
>
> Ms. Cordeiro further testified that each division within Haleakala had control of its allocated budget, with overall control exercised by Don Reeser. Lastly, Ms. Cordeiro testified that at times, monies were shifted from one division's budget to another division [sic] budget.

(Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion at 6.)

The testimony regarding Cordeiro's responsibilities and that each Park division had control over its allocated budget with overall control exercised by Reeser, does not support a reasonable finding of pretext and Plaintiff provides no explanation as to how it could. Cordeiro's testimony regarding how the budget process works, with division chiefs having control over their budget and overall control of the Park's entire budget exercised by Reeser, was entirely consistent with the testimony of Reeser, Lucero, and Harry. It would not be reasonable for the jury to infer from Cordeiro's testimony that, because Lucero had control over the maintenance division budget and Reeser had overall control over the entire Park's budget, Defendant's proffered budgetary explanation for terminating Plaintiff was pretextual.

Plaintiff's final statement regarding Cordeiro's testimony on shifting of monies between divisions is not a complete statement of Cordeiro's testimony, nor does it support a finding of pretext. During direct examination of Cordeiro by Plaintiff's counsel, the following exchange took place:

Q: And during the course of your work, have you ever had occasion to learn that monies have been shifted from one division to another division?

A: At times, yes.

Q: And this was during the period that Mr. Reeser was the superintendent?

A: Yes . . . .

Q: . . . . From 1990 until the time that you went on maternity leave, do you have any specific recollection as to monies being shifted from one division to another division?

A: It's possible, but I can't recall any specific [sic].

(Plaintiff's Supplemental Memorandum at Exhibit A, pp. 9-10.)

Cordeiro stated that she had no recollection of any specific instances of money being shifted from one division to another during the four years leading up to and including Plaintiff's termination. Plaintiff did not offer evidence of any shifting of money either to or away from the maintenance division during the time period in question, or that money was available in other divisions' budgets that could have been shifted to the maintenance division to compensate for the expected $50,000 reduction from Puu's buyout and the expenditure freeze by Congress. Plaintiff appears to imply that, because shifting of monies between divisions was possible, the Park should have shifted money from another division to the maintenance division to save Plaintiff's temporary maintenance position when Lucero realized he did not have the funds to sustain that position in fiscal year 1995. Plaintiff's counsel did not present any evidence, case law, or argument to explain how the failure of Reeser to shift funds in this manner could constitute a reasonable sign of pretext.

The implication that Reeser could and should have shifted funds from another division in order to save Plaintiff's temporary position, which Plaintiff had been absent from for four months and had indicated that he would not be able to return to for the indefinite future, is simply irrational. Cordeiro's testimony that money shifting between

divisions was possible, when viewed in the light most favorable to Plaintiff, does not constitute a reasonable basis for a jury to infer that Defendant's budgetary explanation was pretextual.

Plaintiff also points out for the first time in his Supplemental Memorandum, Cordeiro's testimony "that the permanent and seasonal employees in 1994 were either replaced or still employed at the Park at the time of trial." (Plaintiff's Supplemental Memorandum at 2.) Plaintiff fails to explain the significance of this testimony, however, or how it could reasonably support a finding of pretext.

Reeser and Lucero both testified that the position that Plaintiff had held was never filled after he was terminated because they did not have the money to do so. Cordeiro did not contradict that assertion, as she specifically testified that she was not sure if Plaintiff had been replaced. Although a reasonable inference of pretext could be made if Plaintiff showed that his position was filled by a new hire after he was terminated, Plaintiff did not identify or present any evidence to establish that Plaintiff was replaced after his termination.

Cordeiro merely testified regarding a number of employees who were employed by the maintenance division in 1994, and indicated that, other than Plaintiff, all of those employees were either still working in the maintenance division or had been replaced. That testimony does not support a reasonable finding of pretext, and Plaintiff does not attempt to explain how it could. Lucero explained why Plaintiff was the only employee who was actually terminated, and that the subsequent expected terminations of Korn and Havelin were not carried out because the budget no longer required their termination after it was discovered that Puu's buyout was never recorded by NPS

headquarters. Cordeiro's testimony did not contradict or cast doubt on that explanation.

Most of the employees mentioned by Cordeiro were permanent employees, and Harry's uncontradicted testimony had already indicated that temporary federal employees must be removed prior to permanent employees if lay-offs were necessary. Cordeiro did not testify that there was any new temporary maintenance employee who started after Plaintiff's termination and took his position, and Plaintiff did not identify or present any other evidence of such a replacement. Plaintiff claims in his Supplemental Memorandum that Cordeiro testified that Peter Kafka was a new seasonal employee. (*Id.*) That claim is a misrepresentation of Cordeiro's testimony. Moreover, any claim or inference by Plaintiff that Kafka was a new Park employee hired after Plaintiff's termination to replace him is contradicted by one of Plaintiff's own trial exhibits, which shows that Kafka was a Park employee and had worked in the maintenance division prior to Plaintiff's return to work in March 1994. (Plaintiff's Exh. 78 at ¶ 5.)

Accordingly, Plaintiff has failed to identify any valid basis in Cordeiro's testimony, construed in the light most favorable to Plaintiff, from which a reasonable jury could have made a finding of pretext.

f. Conclusion

Once Plaintiff established a prima facie case of retaliatory employment termination, Defendant was required to produce admissible evidence of a legitimate nondiscriminatory reason for Plaintiff's termination. Defendant clearly satisfied this burden.

Defendant produced evidence that, at the end of fiscal year 1994, Plaintiff was slated for termination along with two other temporary maintenance employees due to a lack of funds. Defendant presented evidence that, despite cost increases and the transfer of a permanent maintenance employee from another Park, a reduction in the allocated budget by the NPS arising from Puu's buyout and an expenditure freeze by Congress was expected in September 1994. Defendant also offered evidence that Plaintiff was terminated first because he was a temporary employee on indefinite requested leave at the time, and there was only enough money to keep two temporary workers on the Park's payroll for four pay periods at the beginning of fiscal year 1995. Defendant also showed that, subsequent to 50 Plaintiff 's termination and prior to the termination of the other two temporary employees, it was discovered that the expected reduction in the budget did not occur due to NPS headquarters' unanticipated failure to record Puu's buyout. That oversight made it unnecessary to proceed with the termination of the other two temporary employees. Defendant explained that Plaintiff was not considered for reinstatement, which would have resulted in the termination of one of the other two employees, because (1) he had already been terminated, (2) he had never indicated that he would be able to return to work due to his alleged inability to work due to occupational stress, and (3) he did not indicate that he wanted to be reinstated.

Once Defendant produced this budgetary reason for terminating Plaintiff, the presumption of discrimination raised by Plaintiff's prima facie case disappeared, and Plaintiff was left with the ultimate burden of proving that Defendant terminated Plaintiff to intentionally retaliate against him for having engaged in protected activities. *Hicks*, 509 U.S. at 510-11. In response to Defendant's

proffered nondiscriminatory reason, Plaintiff was required to do more than rely on his prima facie case and deny the credibility of Defendant's witnesses. *Wallis*, 26 F.3d at 890. Plaintiff had the burden of producing specific, substantial evidence of pretext. *Id.* Plaintiff did not do so. Plaintiff did not offer any evidence to contradict the ample testimonial and documentary evidence submitted by Defendant in support of the legitimate nondiscriminatory reason for terminating Plaintiff.

Although it is up to the jury to determine whether Defendant's proffered explanation for Plaintiff's termination was merely a pretext for unlawful retaliation, the jury must have a reasonable basis in the evidence to support its decision. "The trier of fact may not simply choose to disbelieve the employer's explanation in the absence of any evidence showing why it should do so." *Swanson v. General Serv. Admin.*, 110 F.3d 1180, 1185 (5th Cir. 1997) (citing *EEOC v. Louisiana Office of Community Serv.*, 47 F.3d 1438, 1443-44 (5th Cir. 1995) (additional citations omitted)).

Defendant produced ample testimonial and documentary evidence supporting its proffered reason. The alleged evidence of pretext identified by Plaintiff in Plaintiff's opposition to Defendant's Renewed Rule 50 Motion and Plaintiff's Supplemental Memorandum, is either a misrepresentation of the testimony presented at trial or insufficient, even when viewed in the light most favorable to Plaintiff, for a reasonable jury to have made a finding of pretext. The dearth of any evidence presented by Plaintiff from which the jury could have reasonably determined, rather than merely speculated, that Defendant's budgetary reason for terminating Plaintiff was false, compels the Court to conclude that the jury's verdict on the termination claim cannot

stand. *See Maynard*, 37 F.3d at 1405. The evidence presented at trial, construed in the light most favorable to Plaintiff, permits only one reasonable conclusion — that Plaintiff did not prove Defendant's proffered budgetary reason to be pretextual. Accordingly, Defendant is entitled to judgment as a matter of law on Claim Two.

2. Evidence of Retaliation

The Court's determination that Plaintiff did not present sufficient evidence at trial to support a reasonable finding of pretext entitles Defendant to judgment as a matter of law on Plaintiff's retaliatory termination claim. Had the alleged evidence of pretext been sufficient to raise a genuine issue of material fact regarding the truthfulness of Defendant's budgetary explanation of Plaintiff's termination, however, Plaintiff still failed to sustain his ultimate burden of proving intentional discrimination with respect to his termination. Plaintiff failed to present any evidence of retaliatory intent on the part of Defendant in terminating Plaintiff. Plaintiff's minimal prima facie case coupled with what would have been, at best, an extremely questionable finding of pretext given the abundant evidence supporting Defendant's proffered reason, would be insufficient to support a reasonable finding of retaliatory termination considering all of the evidence presented at trial, construed in the light most favorable to Plaintiff.[7]

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[7] *See Hicks*, 509 U.S. at 524 ("That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of [retaliation] is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review — which should be conducted on remand in this case under the 'clearly erroneous' standard . . . .") (emphasis added); *Fisher*, 114 F.3d at 1337-47.

As indicated above, Plaintiff had the burden at trial of proving both that Defendant's budgetary explanation for his termination was false, and that intentional retaliation against Plaintiff for having engaged in protected EEO activities was the real reason. *Hicks*, 509 U.S. at 515. Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion identifies several alleged examples of evidence or testimony presented at trial that Plaintiff claims support a reasonable finding of retaliatory intent.

a. Reeser's testimony

Plaintiff asserts that Reeser testified that he was embarrassed by the findings of the NPS fact-finding team that was sent to the Park in April 1993. (Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion at 3.) Plaintiff misrepresents the testimony presented at trial. When repeatedly asked by Plaintiff's counsel whether the investigation and its repercussions caused him any embarrassment, Reeser responded that they did not. Reeser admitted that the investigation and allegations of EEO violations caused him stress, but added that he has a lot of stress related to his job as superintendent and that the investigation was just one of the many things that caused him stress.

Plaintiff again mischaracterizes the testimony presented at trial in stating that,

> [w]hen queried as to whether he believed that the Plaintiff was directly responsible for the fact finding committee being established and tasked to inspect Haleakala, Don Reeser stated an unequivocal yes

> response and volunteered that it was Plaintiff, and "his political connections" which [sic] caused the inspection. The jury could and certainly did observe Mr. Reeser [sic] demeanor and bitterness when he blurted out this unsolicited response that it was Eric Nakamura and his "political connections" which was [sic] the reason [sic] for the presence of the fact finding committee.

(Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion at 3.) A review of the trial transcript reveals the following exchange between Plaintiff's counsel and Reeser, which differs from Plaintiff's statement of that testimony:

> Q. What was your understanding of the role of Mr. Nakamura in instigating this April 1993 inspection
> A. I think he was a lead player because of his political contacts.
> Q. I'm sorry?
> A. I think he was a lead player because of his political contacts.
> Q. And is that the impression that you had in September of 1993?
> A. Well, that was the same impression I had during the investigation and after the investigation, yes. Same impression I have now.
> Q. That you have now?
> A. Yes.

(Partial Transcript of Proceedings, June 12, 1997, at 19.)

Plaintiff's memorandum characterizes Reeser's demeanor during this exchange as one of bitterness. The Court observed Reeser's demeanor and found that he answered Plaintiff's counsel's of ten cumulative questions in a normal and unremarkable tone. Reeser answered Plaintiff's counsel's question regarding his opinion of Plaintiff's role in instigating the investigation in a clear and straightforward manner, by responding that he thought Plaintiff was a lead player due to his political contacts. Reeser's statements were not bitter unsolicited outbursts about Plaintiff's political connections, as Plaintiff's memorandum claims. Plaintiff and Defendant both stipulated that, at Plaintiff's instigation, a member of Congress requested the U.S. Department of Interior to investigate Plaintiff's claims of EEO claims at the Park. (June 23, 1997 Stipulation at ¶ 3.) Reeser was merely stating the undisputed truth in his testimony regarding Plaintiff's role in initiating the NPS investigation.

Construed in the light most favorable to Plaintiff, Reeser's testimony regarding the fact that the NPS investigation caused him stress and his acknowledgment that Plaintiff played a key role in initiating that investigation are insufficient, without more, to support a reasonable finding of retaliatory intent in Plaintiff's termination by a separate individual approximately a year and a half later.

b. Jury attention to the stipulation

Plaintiff also asserts in his Opposition to Defendant's Renewed Rule 50 Motion, "[tlhat the jury could and did conclude that Don Reeser harbored retaliatory motives, can be readily ascertained by the close attention that they paid to the stipulation submitted to them by

the parties." (Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion at 3.) Plaintiff makes no attempt to explain how the close attention allegedly paid by the jury to the stipulation filed June 23, 1997, readily evinces a conclusion that Reeser harbored retaliatory motives against Plaintiff, which led to Lucero's termination of Plaintiff. The Court finds that none of the information contained in the stipulation could compel a reasonable finding that Reeser harbored retaliatory motives against Plaintiff causing Reeser to instruct Lucero to terminate Plaintiff.

c. Lucerols testimony

Plaintiff points to three portions of Lucero's testimony as providing support for a reasonable finding that Lucero exhibited retaliatory intent in terminating Plaintiff in September 1994. First, Plaintiff offers Lucero's testimony that he became aware of the April 1993 NPS inspection when he reviewed a document concerning the investigation after his arrival at the Park in October 1993. Lucero also testified that he was aware of Plaintiff's involvement with the investigation, and that Plaintiff was not working at the time Lucero, began working at the Park. Plaintiff does not elaborate on how Lucero's knowledge of the prior NPS investigation and Plaintiff's involvement therewith would foster an intent by Lucero to retaliate against Plaintiff.

Lucero did not begin working at the Park until several months after the NPS investigation was concluded, and long after the events that were the subject of that investigation took place. The investigation's findings did not reflect upon Lucero in any way.

Lucero testified that he had a positive impression of Plaintiff when he first met him, and that he found Plaintiff's work performance to be good following Plaintiff's return to work on March 20, 1994. The undisputed evidence presented at trial showed that Lucero issued memoranda (Plaintiff's Exhs. 78 & 79) and held meetings with the maintenance department staff, including a meeting held at Plaintiff's request, to instruct everyone in the department to behave professionally and to admonish that reprisal actions by Plaintiff's co-workers would not be tolerated. Plaintiff acknowledged that Lucero warmly received Plaintiff's return to work in March 1994, and held the aforementioned meeting with Plaintiff and Mercado at Plaintiff's request.

The undisputed evidence presented at trial indicated that, upon his arrival at the Park, Lucero sought to establish a new beginning and have everyone in the maintenance division work together as a team, and not dwell on past events. Plaintiff has failed to explain how Lucero's knowledge of Plaintiff's involvement with the April 1993 NPS investigation supports a finding of retaliation by Lucero, and no reasonable jury could have based such a finding on that knowledge.

Plaintiff's second argument with respect to Lucero's testimony is that, "Pete Lucero unequivocally denied that he warned or threaten [sic] Wendall Sagon when Wendall Sagon advised him that he was scheduled to speak on a Maui radio station as to the personnel problems existing at Haleakala." (Plaintiff's Opposition to Defendant's Renewed Rule 50 Motion at 4.) Plaintiff's memorandum once again misrepresents the testimony presented at trial.

Contrary to Plaintiff's assertion, Lucero testified that he did not recall being informed that Sagon was going to appear on a radio

program and discuss alleged problems at the Park.[8] Lucero denied telling Sagon or anyone that if he spoke out against the Park he would not advance within the NPS. Plaintiff's memorandum misstates the record and does not explain how that alleged denial by Lucero regarding threatening Sagon about a radio appearance in October 1993 would support a reasonable conclusion that Lucero harbored retaliatory intent against Plaintiff in terminating him approximately one year later.

Plaintiff's final argument in support of a finding of retaliatory intent by Lucero is extremely difficult to comprehend. Plaintiff's memorandum states that:

> The jury apparently found that Pete Lucero was not credible when he denied his retaliatory motives, especially in light of the fact that Pete Lucero, volunteered that Pete Lucero [sic] had made so many complaints that "he could not keep track of them" and that he, Pete Lucero was aware of the Plaintiff's informal EEO complaint made after the May 26, 1994 incident, made prior to

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[8] The trial transcript reflects the following exchange between Plaintiff's counsel and Lucero regarding this issue:

Q. And around that time frame [in October 1993], after meeting Mr. Sagon, you learned that he was going to appear on a radio show and talk about the problems at the park, is that right?
A. No, I don't recall that.
Q. Do you ever recall telling Mr. Sagon if he ever spoke out against the park he would not go anywhere within the park service?
A. No, I would never say that.
Q. You would never say that to anybody?
A. No.

his decision to terminate the Plaintiff in September, 1994.

(*Id.*) As indicated above, the determination of Lucero's credibility is an issue for the jury to determine and the Court cannot make credibility findings in ruling on this motion. Plaintiff has failed, however, to identify or present any evidence that would support a reasonable finding of retaliatory intent against Plaintiff by Lucero.

Plaintiff's assertion that Lucero testified that Lucero had made so many complaints that "he could not keep track of them" does not make any sense. If Plaintiff's counsel made a mistake in drafting the memorandum and meant to state that Lucero volunteered that--Plaintiff had made so many complaints that "he could not keep track of them" the trial record does not reflect any testimony by Lucero regarding the number of Plaintiff' complaints. Plaintiff also fails to explain how Lucero's alleged comment at trial, which does not appear in the record, would cause a reasonable jury to conclude that Lucero harbored retaliatory motives against Plaintiff.

Plaintiff's claim regarding Lucero's testimony that he was aware of Plaintiff's EEO complaint regarding the May 26, 1994 incident, when Plaintiff was charged with four hours of absence without leave, also does not support a reasonable finding of retaliatory intent. It is unclear whether Plaintiff is claiming that Lucero testified that he knew of Plaintiff's EEO complaint stemming from that incident prior to his decision to terminate Plaintiff in September 1994. If so, Plaintiff's counsel has once again misrepresented the testimony

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Partial Transcript of Proceedings, June 11, 1997, at 52.)

presented at trial. Lucero merely testified that he was aware that Plaintiff had filed an EEO complaint against him. Plaintiff Is counsel did not ask Lucero when he became aware of the complaint. Lucero's testimony on that issue, therefore, could not support a reasonable jury finding of retaliatory intent by Lucero, because he did not testify that he knew of Plaintiff's complaint against him at the time he made the decision to terminate Plaintiff.

Even if Lucero had testified that he knew of Plaintiff's EEO complaint against him prior to his decision to terminate Plaintiff, that would not support a finding of retaliatory intent by Lucero in terminating Plaintiff. Such testimony would only serve to satisfy Plaintiff's prima facie case of retaliation, in that Lucero knew of Plaintiff's engagement in a protected activity, which was closely followed by an adverse employment action against Plaintiff. Once Defendant produced a valid non-discriminatory explanation for Plaintiff Is termination, however, the presumption of discrimination raised by Plaintiff's prima facie case disappeared. *Hicks*, 509 U.S. at 510-11. Plaintiff was required to produce evidence that Lucero's budgetary reason for terminating Plaintiff from his temporary maintenance position was merely a pretext for intentional retaliation. Although the timing of Plaintiff's termination following his involvement in protected activities suffices to establish a minimal prima facie case of retaliation, it does nothing to refute Defendant's proffered legitimate reason for terminating Plaintiff. *Hashimoto*, 118 F.3d at 680.

d. Conclusion

Plaintiff has failed to identify any evidence presented at trial that would support a reasonable finding of retaliatory intent underlying Plaintiff's termination. Plaintiff established a prima facie case of retaliatory termination which created an initial presumption of discrimination. Once Defendant produced evidence that Plaintiff was terminated for nondiscriminatory budgetary reasons, however, that presumption, "having fulfilled its role of forcing the defendant to come forward with some response, simply drop[ped] out of the picture." *Hicks*, 509 U.S. at 510-11.Although the timing of Plaintiff's termination following his involvement in protected EEOI activities "suffices to establish a minimal prima facie case of retaliation, it does nothing to refute the government's proferred [sic] legitimate reasons for terminating Plaintiff.] *Hashimoto*, 118 F.3d at 680.

Defendant produced abundant documentary evidence and testimony at trial supporting Defendant's proffered budgetary reason for terminating Plaintiff. Defendant also produced evidence indicating that Plaintiff's supervisors made numerous reasonable efforts to accommodate, rather than retaliate against, Plaintiff, by granting him extended periods of requested leave, and to ensure that Plaintiff's co-workers would not retaliate against him. The jury must have accepted at least some of this evidence in finding for Defendant on Claims One and Three. Plaintiff produced no evidence at trial from which a jury could have reasonably concluded that he was terminated as a result of unlawful retaliation rather than Defendant's stated budgetary reason. Plaintiff's "claim that (he) did one thing, and subsequently the other thing happened to [him], is, in the factual context of this case, insufficient to allow that inference." *Nelson v.*

Pima Community College, 83 F.3d 1075, 1081 (9th Cir. 1996); *see also Tarin v. County of Los Angeles*, 123 F.3d 1259, _, 1997 WL 525514 at * 3-4 (9th Cir. 1997).

III. PLAINTIFF'S MOTION FOR JUDGEMENT AS A MATTER OF LAW AS TO CLAIMS ONE AND THREE

On July 7, 1997, Plaintiff filed a Motion for Judgment as a Matter of Law as to Claims One and Three ("Plaintiff's Motion for Judgment as a Matter of Law") . Plaintiff filed a single-paragraph memorandum in support of his motion, claiming that

> as the jury clearly found that the Defendant's agents and representatives lacked credibility in their denial of retaliatory animus against the Plaintiff, this court's denial of the rebuttal testimony of Wendall Sagon, and the undisputed testimony of the Plaintiff as to the cause of his emotional distress on May 26, 1994, would mandate that this Court grant him judgment as a matter of law as to his claims denominated as Claims No. 1 and 3 herein.

(Plaintiff's Motion for Judgment as a Matter of Law at 1.)

Plaintiff fails to explain how these three alleged facts would mandate judgment as a matter of law with respect to Claims One and Three. In analyzing Plaintiff's Motion for Judgment as a Matter of Law, the Court construes the evidence presented at trial in the light most favorable to Defendant. *Forrett*, 112 F.3d at 419. The evidence presented at trial was clearly sufficient to support the jury's verdicts in

favor of Defendant on Claims One and Three. Plaintiff failed to prove that the alleged retaliatory acts of Plaintiff's co-workers rose to the level of a hostile work environment. The evidence presented also showed that Defendant took appropriate remedial measures to ensure that Plaintiff would not be retaliated against by his co-workers. The evidence also showed that Lucero's disapproval of Plaintiff's requested leave status for one-half day on May 26, 1994, resulted not from retaliation, but from Plaintiff's departure from work without Lucero I s permission after Plaintiff became irrational over Lucero's reasonable response to Plaintiff' s complaint that nobody on the understaffed maintenance division covered all of Plaintiff's work for him when he took unexpected leave for a week.

The overwhelming evidence at trial supported the jury's verdicts in favor of Defendant on Claims One and Three. Plaintiff's abbreviated memorandum in support of his motion presents no reason why the Court should disturb those verdicts. Accordingly, Plaintiff Is Motion for Judgment as a Matter of Law is DENIED.

IV. PLAINTIFF'S MOTION FOR ORDER GRANTING BACK PAY, REINSTATEMENT, OR, ALTERNATIVELY, FRONT PAY

On July 7, 1997, Plaintiff filed a Motion for Order Granting Back Pay, Reinstatement, or, Alternatively, Front Pay ("Plaintiff's Motion for Back Pay") . In light of the Court's granting of Defendant's Motion to Dismiss and Defendant's Renewed Rule 50 Motion, Plaintiff Is Motion for Back Pay must he denied because Defendant is entitled to judgment as a matter of law on Plaintiff's termination claim. Even if the Court had not granted Defendant's

Motion to Dismiss and Defendant's Renewed Rule 50 Motion, however, Plaintiff's Motion for Back Pay would still be denied.

The statutory provision governing an award of back pay and other equitable relief in this case provides, in pertinent part:

> If the court finds that the respondent has intentionally engaged in ... an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay or any other equitable relief as the court deems appropriate. . . . Interim earnings or amounts earnable with reasonable diligence by the person . . . discriminated against shall operate to reduce the back pay otherwise allowable.

42 § U. S.C. 2000e-5 (g) (1) (emphases added).

First, the Court notes that Defendant engaged in an unlawful employment practice in terminating Plaintiff. Assuming that there had been enough evidence presented at trial to preclude judgment as a matter of law on Plaintiff's retaliatory termination claim, the Court would still find the jury's verdict on that claim to be contrary to the overwhelming weight of the evidence in favor of Defendant.

Even if the Court was bound by the jury's verdict on the termination claim with respect to the Court's equitable determination

of back pay, an award of the back pay, reinstatement, and/or front pay requested by Plaintiff would not he appropriate in this case. The jury awarded Plaintiff $30,000 in compensatory damages. The Court finds that, in light of all of the evidence presented at trial, an award of the additional equitable relief requested by Plaintiff would involve resort to speculation and would not constitute an approximate exercise of the Court's discretion.

As detailed above, Plaintiff was out on indefinite requested leave for over four months at the point he was terminated on September 30, 1994. Plaintiff had also been off work for approximately six months, on unpaid intermittent status, from September 1993 to March 1994. It would be pure speculation and an abuse of discretion for the Court to award Plaintiff back pay from September 30, 1994, when the evidence presented by Plaintiff indicated that he was unable to work at that time.

Plaintiff also requests back pay up to the present, as well as reinstatement and front pay, when Plaintiff was a temporary employee whose employment was renewed on a yearly basis. Defendant produced evidence that Plaintiff's termination at the end of the fiscal year 1994, and Plaintiff failed to show that Defendant filled Plaintiff's position with another employee at any time after his termination. It would be pure speculation for the Court to award Plaintiff the backpay he is requesting from September 30, 1994 to the present, given his own alleged inability to work as of September 30, 1994 and the fact that he was a temporary worker whose employment was renewed on a yearly basis as needed by the Park. Reinstatement or an award of front pay would also not constitute a proper exercise of discretion for the reasons listed above, as well as the Court's determination that an order

reinstating Plaintiff to the Park would be inappropriate in light of the evidence presented at trial.

For all of the reasons set forth above, Plaintiff Is Motion for Back Pay is DENIED.

V. PLAINTIFF'S MOTION FOR ORDERING AN AWARD OF ATTORNEY'S FEES AND COSTS OF LITIGATION

On July 7, 1997, Plaintiff filed a Motion for Order Granting an Award of Attorney's Fees and Costs of Litigation ("Plaintiff's Motion f or Fees") . In light of the Court's granting of Defendant's Motion to Dismiss and Defendant's Renewed Rule 50 Motion, there is no issue upon which Plaintiff prevailed in this case. Accordingly, Plaintiff has no right to the attorney's fees he requests under 42 U.S.C. § 2000e-5(k).

The Court notes that even if it had denied both Defendant's motion to Dismiss and Defendants Renewed Rule 50 Motion, the award of $134,769.67 requested by Plaintiff's counsel is excessive and unwarranted. Plaintiff, may only recover fees with respect to those claims upon which Plaintiff prevailed. Most of the claims made by Plaintiff in this case were either dismissed by the Court prior to trial or rejected by the jury. Yet Plaintiff's counsel has requested fees that pertain not only to claims upon which Plaintiff did not prevail, but that do not even pertain to Plaintiff. Plaintiff's counsel includes in his request for fees, time spent on issues that pertain solely to other plaintiffs who have been dismissed from this action and who did not prevail on a single claim. The Court also notes that Plaintiff's counsel

requests that the Court award fees at hourly rates in excess of the rate agreed upon in his retainer agreements with Plaintiff. Plaintiff's counsel is instructed to limit any fee request that he may submit to this Court in the future to fees relating to claims upon which his client prevailed and to which his client is entitled.

In accordance with the foregoing, Plaintiff's Motion for Fees is DENIED.

CONCLUSION

In accordance with the foregoing, it is HEREBY ORDERED that:

1. Defendant's Rule 12(h)(3) Motion to Dismiss is GRANTED.

2. Defendant's Renewed Rule 50 Motion for Judgment as a Matter of Law is GRANTED.

3. Plaintiff's Motion for judgment as a 14atter of Law as to Claims One and Three is DENIED.

4. Plaintiff's Motion for Judgment Motion for Order Granting Back Pay, Reinstatement, or Alternatively, Front Pay is DENIED.

5. Plaintiff's Motion for Order Granting an Award of Attorney's Fees and Costs of Litigation is DENIED.

6. The judgment entered herein on July 2, 1997 is PARTIALLY SET ASIDE. The jury's verdict in favor of Plaintiff with respect to Plaintiff's retaliation claim regarding his September 1994 termination (Claim Two) and award of $30,000 in compensatory damages to Plaintiff, are SET ASIDE. The Clerk of the Court is instructed to enter judgment in favor of Defendant on all claims.

IT IS SO ORDERED.

ERIC K. NAKAMURA, et al., Plaintiff,

v.

BRUCE BABBITT, in his official capacity as Secretary of the United States Department of the Interior, Defendant.

Civ. No. 95-00243 HG

Appeal from the United States District Court
for the District of Hawaii
Helen Gilmor, District Judge, Presiding

Argued and Submitted, November 6, 1998
Honolulu, Hawaii

ORDER

Before: GOODWIN, BEEZER and T.G. NELSON, Circuit Judges.

The panel has voted to deny appellants' petition for rehearing. Judge Nelson has voted to reject the en banc suggestion and Judges Goodwin and Breezer so recommend.

The full court was advised of appellants' suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

ERIC K. NAKAMURA, RONALD SATO,
Plaintiffs-Appellants

v.

BRUCE BABBITT, in his official capacity as Secretary of the United States Department of the Interior, Defendant-Appellee.

No. 97-17288

United States Court of Appeals
for the Ninth Circuit

December 23, 1998

JUDGMENT

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the united States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV - JURISDICTION AND VENUE
CHAPTER 81 - SUPREME COURT

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 - CIVIL RIGHTS
SUBCHAPTER VI - EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers, issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans;

review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall —

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to —

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal

from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure

nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

29 C.F.R. § 1614.105

§ 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b) At the initial counseling session, Counselor must advise individuals in writing of their rights and responsibilities, including the right to request a hearing after an investigation by the agency, election rights pursuant to §§ 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination

under this part, the duty to mitigate damages, administrative and court time frames and that only the matter(s) raised in pre-complaint counseling (or issues like or related to issues raised in pre-complaint counseling) my be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the agency has an established dispute resolution procedure under paragraph (f) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the Counselor's attention. If the matter has not been resolved, the aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice

shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.

29 C.F. R. § 1614.107

§ 1614.107 Dismissals of complaints.

The agency shall dismiss a complaint or a portion of a complaint:

(a) That fails to state a claim under § 1614.103 or 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(b) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c) unless the agency extends the time limits in accordance with § 1614.604(c) or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(c) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(d) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and § 1614.301 or §1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(e) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory;

(f) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(g) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available; or

(h) If, prior to the issuance of the notice required by § 1614.108(f), the complainant refuses within 30 days of receipt of an offer of settlement to accept an agency offer of full relief containing a certification from the agency's EEO Director, Chief Legal Officer or a designee reporting directly to the EEO Director or the Chief Legal Officer that the offer constitutes full relief, provided that the offer gave notice that failure to accept would result in dismissal of the complaint. An offer of full relief under this subsection is the appropriate relief in § 1614.501.

29 C.F. R § 1614.110

§ 1614.110 Final decisions.

Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision, or within 60 days of receiving the findings and conclusions of an administrative judge, the agency shall issue a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The final decision shall contain notice of the right to appeal to the Commission, the name and address of the agency official upon whom an appeal should be served, notice of the right to file a civil action in Federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the decision.

29 C.F.R. § 1614.504

§ 1614.504 Compliance with settlement agreements and final decisions.

(a) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any state of the complaint process, shall be binding on both parties. A final decision that has not bee the subject of an appeal of civil action shall be binding on the agency. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or final decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The agency shall resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of non-compliance, but must file an appeal within 30 days of his or her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

(c) Prior to rendering its determination, the Commission may request that parties submit whatever additional information or documentation it deems necessary or may direct that an investigation or hearing on the matter be conducted. If the Commission determines that the agency is not in compliance and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts or discrimination violate a settlement agreement shall be processed as separate complaint under § 1614.106 or § 1614.204.

Federal Rules of Civil Procedure Rule 43

UNITED STATES CODE ANNOTATED FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

VI. TRIALS

Rule 43. Taking of Testimony

(a) Form. In every trial, the testimony of witnesses shall be taken in open court, unless a federal laws, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

[(b), (c) Abrogated]

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, by the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

(f) The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The

compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

Federal Rules of Civil Procedure Rule 50

RULE 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion For New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on a issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for the New Trial.

If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment– and may

alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law.

If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

ERIC K. NAKAMURA, et al., Plaintiff,

v.

BRUCE BABBITT, in his official capacity as Secretary of the United States Department of the Interior, Defendant.

Civ. No. 95-00243-HG

United States District Court,
District of Hawaii

September 19, 1996

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

GILMOR, District Judge.

On March 28, 1995, Plaintiffs Eric K. Nakamura ("Nakamura"), Ronald N. Sato ("Sato"), and David A. Texeira ("Texeira") filed a complaint against Defendant Bruce Babbitt, in his official capacity as Secretary of the United States Department of the Interior ("Defendant"). Plaintiffs are former employees of the Maintenance Division of Haleakala National Park (the "Park"), and allege that various Park employees discriminated against them in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*

On February 12, 1996, Defendant filed a motion for summary judgment dismissing the Title VII claims asserted by Plaintiffs Nakamura, Sato and Texeira. This motion came on for hearing on May 6, 1996, with Clayton C. Ikei and Sherell N. McFarlane appearing on behalf of Plaintiffs Nakamura, Sato and Texeira, and Assistant U.S. Attorney R. Michael Burke appearing on behalf of Defendant. Plaintiff Texeira has since stipulated to a dismissal of his claims against Defendant. See Stipulation for Dismissal with Prejudice Claim of David A. Texeira, filed July 8, 1996. Accordingly, this order only addresses Defendant's motion for summary judgment as it relates to the outstanding Title VII claims asserted by Plaintiffs Nakamura and Sato (collectively referred to as "Plaintiffs"). For the reasons set forth below, the Court DENIES the motion of Defendant for summary judgment dismissing Plaintiffs, claims.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv.*,

Inc. v. Pacific Elec.Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The movant need not advance affidavits or similar materials to negate the existence of an issue on which the opposing party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323.

If the moving party meets its burden, then the opposing party must come forward with "specific facts showing that there is a genuine issue for trial" in order to defeat the motion. Fed. R. Civ. P. 56(e); T. W. Elec., 809 F.2d at 630. The opposing party cannot stand on the pleadings nor simply assert that it will discredit the movant's evidence at trial. *Id.* "If the factual context makes the [opposing] party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Cal. Arch. Bldg. Prods. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)), *cert. denied* 484 U.S. 1006 (1988).

The standard for summary judgment reflects the standard governing a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). When there is a genuine issue of material fact, "the judge must assume the truth of the evidence set forth by the [opposing] party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Inferences from the facts must be drawn in the light most favorable to the non moving party. *Id.*

DISCUSSION

Defendant moves for summary judgment dismissing the Title VII claims of Plaintiffs Nakamura and Sato. Defendant contends that Plaintiffs' suit is subject to summary judgment because their Title VII discrimination claims: (1) were untimely, having not been brought to the Park's attention as required by law; and/or (2) have been fully compromised; and/or (3) state a claim for which no relief can be granted. Defendant's Memorandum in Support at 1. The Court disagrees.

I. Plaintiff Nakamura's Title VII Retaliation Claims

A. Background

Plaintiff Nakamura's Title VII claim is premised on a chronology of events which date back to April 1993. The Complaint asserts that Plaintiff Nakamura was subjected to a hostile work environment from May 1993 until September 30, 1993, when he took a temporary leave of absence from his seasonal maintenance employment, in retaliation for instigating an April 1993 NPS investigation into allegations of racial harassment and

discrimination by Park Supervisor David Puu. Plaintiff Nakamura and the Park eventually resolved this matter by way of Informal Resolution Agreements dated February 14, 1994 and April 11, 1994.

Plaintiff Nakamura also asserts that he endured retaliation upon his return to work on March 20, 1994, which culminated in his termination on September 30, 1994. In one instance, this alleged retaliation surfaced in connection with Plaintiff Nakamura's leave during the May 22-26, 1994 period. In a letter to Equal Employment

Opportunity ("EEO") Counselor Ronald Nagata dated June 27, 1994, Plaintiff Nakamura recounted that, on May 22, 1994, his immediate supervisor Doug Buttery granted his request to take "stress leave" for the remainder of the day, and through May 25, 1994, but on May 23, 1994, Maintenance Supervisor Peter Lucero informed him that any "annual leave" would not be approved. Exhibit E to Declaration of Donald W. Reeser in support of Defendant's Motion for Summary Judgment, filed February 12, 1996 ("Reeser Decl.") at 67-69. With respect to May 26, 1994, Plaintiff Nakamura recounted that he had submitted a leave slip for leave without pay to Acting Superintendent Bob Butterfield, and that Butterfield verbally authorized him to leave, but that Lucero later charged him with being absent without leave ("AWOL"). *Id.* Plaintiff Nakamura explained in the letter that his leave was necessitated by stress linked to "the hardship" created by the Park Service, and specifically referenced the Park's "breachment of my agreement."

B. Analysis: Title VII Retaliation Claim Regarding May 22-26, 1994 Leave

1. No Issue of Settlement Bar or Administrative Exhaustion

On Defendant' s motion for summary judgment, the Court need not address (1) whether, and to what extent, the administrative exhaustion requirements set forth in 29 C.F.R. § 1614, *et seq.*, preclude adjudication of Plaintiff Nakamura's Title VII claims, nor (2) whether, and to what extent, the Informal Resolution Agreements dated February 14, 1994 and April 11, 1994 bar Plaintiff Nakamura from recovering for allegations of pre-April 11, 1994 retaliatory acts. At

least one element of Plaintiff's Title VII claim was administratively exhausted in a timely manner and was not resolved by any agreement.

Plaintiff Nakamura's Title VII claim includes an allegation of post-April 11, 1994 retaliation in connection with his May 22-26, 1994 leave (the "Leave Incident"). Defendant does not dispute that Plaintiff Nakamura timely exhausted his administrative remedies with respect to the Leave Incident. *See* Defendant's Memorandum in Support at 1, 18. Indeed, through his June 27, 1993 letter to EEO Counselor Ron Nagata, Plaintiff Nakamura clearly initiated contact with an EEO counselor regarding the Leave Incident within 45 days of its May 22-26, 1994 occurrence, as required by 29 C.F.R. § 1614.105(a). Plaintiff Nakamura also participated in EEO Counseling with respect to the alleged retaliatory Leave Incident. *See* Exhibit E to Reeser Decl. at 31-48. On July 20, 1994, EEO Counselor Ron Nagata issued a Notice of Final Interview and Right to File a Discrimination Complaint regarding the Leave Incident.

2. Prima Facie Elements of Retaliation Claim Satisfied

Defendant contends that the Title VII claim regarding the Leave Incident is subject to dismissal because Plaintiff Nakamura has failed to establish his prima facie case for a retaliation claim.

A showing of three elements is required in order to make out a prima facie case of retaliation: (1) the plaintiff engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the participation in the

protected activity and the adverse employment action. *See Wallis v. Simplot*, 26 F.3d 885, 891 (9th Cir. 1994).

Defendant does not dispute here that Plaintiff Nakamura engaged in "protected activity" within the meaning of Title VII. To be sure, such activity can be found in Plaintiff Nakamura's participation in the NPS Investigation and his prior filing of a informal EEO complaint which was settled by the Informal Resolution Agreements. Defendant, however, takes issue with the second and third requirements as they relate to Plaintiff Nakamura's Leave Incident claim. Defendant's Memorandum in Support at 20 and n.7. The Court finds that such requirements have been fulfilled.

a. Adverse Employment Action

Defendant asserts that the Leave Incident did not involve an "adverse employment action" within the meaning of Title VII because the Park eventually granted Plaintiff Nakamura "sick leave" for his May 22-25, 1994 absence, as he originally requested. Plaintiff Nakamura, however, is not limited to complaining about the type of leave that was eventually granted for his May 22-25, 1994 absence. Defendant may be liable for Plaintiff Nakamura's need to take leave itself, if the leave was in fact necessitated by a retaliatory hostile work environment, as Plaintiff Nakamura asserts. A hostile work environment, as opposed to mere ostracism, may constitute an "adverse employment action." *See Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 869 (9th Cir. 1996) (citing *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842, 856 (1989)).

Additionally, the issue of Plaintiff Nakamura's AWOL status on May 26, 1994 remains unresolved. A decision to deny an employee leave is an "adverse employment action," regardless of the length of requested leave. *See Page v. Volger*, 645 F.2d 227, 233 (4th Cir.) (en banc), *cert. denied*, 454 U.S. 892 (1981). Equally significant, if Plaintiff Nakamura is correct that he was actually granted leave without pay on May 26, 1994, the AWOL mark on his employment record alone rises to the leave of an "adverse employment action" within the meaning of Title VII. *See Id.*

b. Causal Connection

Defendant also contends that there can be no factual basis for Mr. Nakamura's allegation in the pleadings that the work absence dispute was causally connected to the protected activity. Defendant's Memorandum in Support at 20. The Court finds that Plaintiff Nakamura has proffered sufficient evidence of a causal connection to satisfy his prima facie burden. A causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Burrus v. United Tel. Co. of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982); see also *Knickerbocker v. City of Stockton*, 81 F.3d 907, 912 (9th Cir. 1996) (citing *Burrus*). In the instant case, the events surrounding the Leave Incident occurred within one year of Plaintiff's protected activities. In addition, Plaintiff Nakamura stated in his affidavit that, after the NPS Investigation, there was ongoing friction between himself and many of his Park coworkers, who were friends with Puu. Nakamura Aff. at ¶18. Defendant has not proffered any evidence suggesting that Plaintiff Nakamura's May 22-25, 1994 sick leave was wholly unrelated to the

alleged hostile work environment, and has not provided a legitimate, non-retaliatory reason for Plaintiff's AWOL status on May 26, 1994.

The Court concludes that Plaintiff Nakamura has presented sufficient evidence to support a finding that the alleged retaliatory Leave Incident was causally connected to his protected activities. Plaintiff Nakamura has satisfied his prima facie burden for his Title VII retaliation claim, insofar as it relates to the Leave Incident. Accordingly, the Court DENIES the motion of Defendant for summary judgment dismissing Plaintiff Nakamura's Title VII claim in the entirety.

II. Plaintiff Sato

A. Background

Plaintiff Sato asserts Title VII claims against Defendant for racial harassment and racial discrimination by Park Supervisor Puu. During the thirteen-year period between January 1978 and January 1992, Plaintiff Sato was employed as a full-time, permanent maintenance worker in the Park Maintenance Division under the supervision of Park Supervisor Puu. Affidavit of Ronald Sato in support of Plaintiffs' Concise Statement filed April 18, 1996 ("Sato Aff.") at ¶ 2. Plaintiff Sato asserts that, throughout this period, Park Supervisor Puu racially harassed him at least three times a week by referring to him in a racially derogatory manner. *Id.* at ¶¶ 3, 4. Plaintiff Sato further contends that Puu assigned him to permanent sanitation duties — cleaning toilets, working with raw sewage, cleaning windows and waxing floors — on account of his Japanese ancestry, and that Puu

gave him negative job referrals when he sought transfers to other departments within the Park, or to other national parks. *Id.* at ¶ 6.

B. Analysis

Defendant contends that Plaintiff Sato's Title VII claim for racial harassment and discrimination should be dismissed in their entirety because (1) he failed to satisfy the administrative exhaustion requirement set forth at 29 C.F.R. § 1613.214(a)(1)(i) ("Section 1613.214 (a) (1) (i)") , Defendant's Memorandum in Support at 13-14, and (2) Defendant took appropriate remedial measures after learning of Plaintiff Sato's allegations. *Id.* at 22-25. The Court disagrees.

1. Section 1613.214(a)(1)(i)

Where, as here, the alleged discriminatory events occurred prior to October 1, 1992, Section 1613.214 (a) (1) (i) required Plaintiff Sato to bring the alleged discriminatory matter to the attention of an EEO counselor within 30 days of its event. 29 C.F.R. § 1613.214(a)(1)(i). Contrary to Defendant's assertions, this regulation did not require Plaintiff Sato to file a written and signed informal EEO complaint with the EEO office within the 30 days, but only to bring the matter "to the attention" of an EEO counselor within the time limitation. *Richardson v. Frank*, 975 F.2d 1433, 1436 (10th Cir. 1992).

Plaintiff Sato states in his affidavit that:

> In the mid to late 1980s, I met Becky Mills at two orientations in . . . California and found that she was an Equal Employment Officer for the western Region office. I told her that my supervisor, Mr. Puu, was calling me "one stupid Jap" and "fucking Jap' [sic] on a regular basis. I also told her that since I had started at Haleakala in 1978 I have only been assigned to sanitation duties despite the fact that I am qualified to do other work such as carpentry and masonry. Ms. Mills responded that my situation was personal. She did not inform me that I had the right to file an equal employment opportunity complaint or any other complaint for that matter . . . .
>
> On October 22, 1985 I spoke to Ms. Mills while attending a women's conference on the Island of Hawaii. I informed her that Mr. Puu was hindering my transfer to other departments or national parks by putting "I cannot judge" in the supervisor's section of my application, and would just assign me sanitation duties. She simply replied that it was "up to my supervisor, that he has to rate how good you are;" she did not inform me that I could file any complaints.

Sato Aff. at 11 9-10. There are genuine issues of material fact as to whether these contacts with EEO Officer Mills were notification of the kind intended to satisfy Section 1613.214(a)(1)(i).

If Plaintiff Sato's discussions with EEO Officer Mills served to bring at least one incident of alleged racial harassment "to her

attention" within the 30-day deadline imposed by Section 1613.214 (a) (1) (i) , the continuing violations doctrine may apply to bring all incidents of alleged racial harassment, reaching back to January 1978, within this regulation. In the instant case the frequency of racial harassment alleged by Plaintiff Sato certainly suggests a continuing violation, that is, a series of separate acts of racial harassment emanating from the same animus and amounting to a hostile work environment. See *Waltman v. International Paper Co.*, 875 F. 2d 468, 476 (5th Cir. 1989) . Under the "continuing violations" doctrine, if one or more of the acts constituting the continuing violation is "brought to the attention" of an EEO counselor within the 30-day statutory deadline set by Section 1613.214 (a) (1) (i) , all acts constituting the "continuing violation" are brought within this administrative regulation, and may be considered. *Id.; see also Green v. Los Angeles County Superintendent of Sch.*, 883 F.2d 1472, 1480 (9th Cir. 1989).

Accordingly, the Court finds that there are genuine issues as to whether Plaintiff Sato has satisfied the administrative requirement set forth in Section 1613.214 (a) (1) (i) with respect to his Title VII claim of racial harassment and discrimination. While Defendant makes much of the fact Plaintiff Sato was a member of the Park's informal EEO committee in 1988, Defendant's Mem. Supp. 13, such participation did not heighten Section 1613.214 (a) (1) (i) , s notice requirements as to Plaintiff Sato, nor did it strip him of the continuing violations doctrine.

2. Remedial Obligations

Under Title VII, an employer is liable for a hostile work environment only if the employer failed to take adequate remedial or disciplinary action after the employer knew or should have known of the conduct generating the hostile work environment. *Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995). Defendant contends that Plaintiff Sato's racial harassment and discrimination claim should be dismissed because the Park promptly took remedial action after learning of such allegations. Defendant relies on the remedial steps taken by Park Superintendent Donald Reeser during and after April 1993. Defendant's Memorandum in Support at 22-25. That is, Defendant proceeds on the basis that his remedial obligation did not commence until April 1993.

There is evidence suggesting that Plaintiff Sato informed the Park management in the mid to late 1980's [sic], if not earlier, that Park Supervisor Puu was racially harassing and discriminating against him. *See* Sato Aff. at ¶¶ 7-10. Such evidence therefore raises questions as to whether the Park's remedial obligations commenced well before April 1993, and if so, whether Reeser's remedial action in April 1993 absolves Defendant from Title VII liability.

In light of the above, the Court DENIES the motion of Defendant for summary judgment dismissing Plaintiff Sato's Title VII claim for racial harassment and discrimination.

CONCLUSION

In accordance with the foregoing, it is HEREBY ORDERED that:

1 . The motion of Defendant Babbitt for summary judgment dismissing Plaintiff Nakamura's Title VII claim is DENIED.

2 . The motion of Defendant Babbitt for summary judgment dismissing Plaintiff Sato's Title VII Claim is DENIED.

IT IS SO ORDERED.

ERIC K. NAKAMURA, et al., Plaintiff,

v.

BRUCE BABBITT, in his official capacity as Secretary of the United States Department of the Interior, Defendant.

Civ. No. 95-00243 HG

United States District Court
District of Hawaii

June 2, 1997

ORDER DISMISSING PLAINTIFF SATO'S CLAIMS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IN A TIMELY MANNER

GILMOR, District Judge.

On February 20, 1997, the Court issued an order with respect to several motions filed by defendant Bruce Babbitt, in his official capacity as Secretary of the United States Department of the Interior ("Defendant"). Pursuant to the February 20, 1997 Order, the Court held a Rule 43(e) pre-trial evidentiary hearing on April 22, 1997 and May 28, 1997 ("Rule 43(e) Hearing"). The Rule 43(e) Hearing was limited to the issues of whether plaintiff Ronald N. Sato ("Sato") failed to exhaust his administrative remedies with respect to his Title VII claims against Defendant or is entitled to equitable relief for any such failure. At the conclusion of the Rule 43(e) Hearing, the Court issued

an oral ruling DISMISSING Sato's claims against Defendant for failure to exhaust administrative remedies.

ANALYSIS

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES IS A STATUTORY PRE-CONDITION TO SUIT AND IS SUITABLE FOR DETERMINATION BY THE COURT BY WAY OF A RULE 43(e) HEARING

As noted in February 20, 1997 Order, the Ninth Circuit does not "recognize administrative exhaustion under Title VII as a jurisdictional requirement per se; [but] as a legal question under the de novo standard because the issue is whether the plaintiff has satisfied a statutory precondition to suit." *Vinieratos v. United States Dep't of Air Force*, 939 F.2d 762, 768 n.5 (9th Cir. 1991). The Supreme Court has held "that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

The Court must decide whether Sato properly exhausted his administrative remedies, as this is a legal question concerning Sato's ability to pursue his claims against Defendant in this action and does not involve the merits of those claims. *See Studio Elec. Technicians Local 728 v. International Photographers of the Motion Picture Indus., Local 659,* 598 F.2d 551, 552 n.2 (9th Cir. 1979). The determination of Sato's eligibility for equitable relief for any such failure to exhaust his administrative remedies is also solely within the province of the

Court. Judicial economy requires that the Court decide the exhaustion issue prior to trial.

On May 23, 1997, Sato filed a memorandum with the Court setting forth supplemental objections to the Rule 43(e) Hearing ("Sato's Supplemental Objections"). Sato's Supplemental Objections were not filed in a timely manner. The deadline for filing all objections to Defendant's pre-trial motions was January 9, 1997, and Sato filed a memorandum in opposition to Defendant's motion for a Rule 43 (e) hearing on that date. The Court was not persuaded by the arguments put forth by Sato in that memorandum. Even if the Court were to consider Sato's Supplemental objections, which were filed over four months after the filing deadline and one month after the Rule 43 (e) Hearing had commenced on April 22, 1997, Sato has not provided the Court with any controlling case law to indicate that the Rule 43(e) Hearing is improper.

Contrary to the arguments raised in Sato's Supplemental objections, the Court did not hold the Rule 43 (e) Hearing in order to make credibility determinations on a motion for summary judgment. The Court held in the February 20, 1997 Order and in a prior order dated September 10, 1996 ("September 10, 1996 Order") that a genuine issue existed as to Sato's alleged failure to exhaust his administrative remedies, which precluded the Court from granting Defendant's requests for summary judgment. February 20, 1997 Order at 14; September 10, 1996 Order at 11-12. The Court's subsequent denial of Defendant's motions to dismiss and for summary judgment, however, does not entitle Sato to a jury trial on the exhaustion issue.

> [W]here, as here, the plaintiff has no right to a jury trial on the issue, a court has considerable latitude in determining a [Title VII] statute of limitations issue even if the facts remain in dispute after the parties have an opportunity to augment the record. The obvious solution is to deny the motion for summary judgment without prejudice and then hold a limited evidentiary hearing on the timeliness issue before proceeding to a full trial on the merits, a procedure which in effect duplicates the proper procedure under Rule 12(b)(1).

Gordon v. Nat'l Youth Work Alliance, 675 F.2d 356, 360-61 n.3 (D.C. Cir. 1982) (internal citation omitted).

Although the Ninth Circuit has not ruled directly on the proper course of action for a district court to take when a genuine issue is raised as to exhaustion of administrative remedies, this Court found the solution proffered by the D.C. Circuit in *Gordon* persuasive and held the Rule 43 (e) Hearing in accordance therewith. In another Title VII case, *O'Neal v. Marine Midland Bank, N.A.*, 848 F. Supp. 413 (W.D.N.Y. 1994), the district court proceeded in the same manner set forth in *Gordon* and adopted by the Court here:

> While resolution of the statute of limitations question cannot be accomplished based on the pleadings presently before this Court, the case dispositive significance of this issue demands that it be resolved before this Court proceeds to analyze the merits of plaintiff's claims. In similar situations, where

> resolution of a single issue may resolve an entire case, it has been noted that "defendants are entitled to an appropriate trial or hearing on that issue before they are put to the time and expense of a full-blown trial on the merits of the entire case."

O'Neal, 848 F. Supp. at 421-22 (citing *Nardone v. Reynolds,* 538 F.2d 1131, 1137 (8th Cir. 1976)), *aff'd*, 60 F.3d 812 (2d Cir. *1995)* ; *See also Marino v. Nat'l R.R. Passenger Co.*, 645 F. Supp. 816 *(S.D.N.Y.* 1986); *Burnham Chemical Co. v. Borax Consolidated,* 170 F.2d 569 (9th Cir. 1948), *cert. denied*, 336 U.S. 924 (1949).

In accordance with the foregoing, the Court reaffirms its prior decision to hold the Rule 43(e) Hearing. The issues of whether Sato has failed to satisfy a statutory pre-condition to suit or is otherwise deserving of equitable relief are solely for the Court to decide, and it is appropriate for the Court to do so prior to trial in the interest of judicial economy.[1]

II. SATO DID NOT MEET THE REGULATORY FILING TIME LIMITS AND IS NOT DESERVING OF EQUITABLE TOLLING OF THOSE TIME LIMITS

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[1]The Court notes that even if Sato was entitled to a trial on the merits of his claims of racial discrimination, most, if not all, of those claims would be tried before the Court rather than a jury. Sato stated in his May 1994 EEO Complaint that the date on which the most recent alleged discrimination took place against him was October 1, 1991. Exhibit I to Plaintiff's Opposition to Motion to Dismiss. Sato is not entitled to a jury trial on any Title VII claims arising prior to November 21, 1991, the effective date of the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

Plaintiff Sato's claims against Defendant arise out of incidents alleged to have occurred while Plaintiff Sato was employed in the Maintenance Division of Haleakala National Park (the "Park"). Plaintiff Sato claims that during the period he was employed by the Park from January 1978 to January 1992, he was racially harassed at least three times a week by his supervisor David Puu. Sato Affidavit, attached as Exhibit B to Plaintiff's Opposition to Motion to Dismiss ("Sato Aff."), at ¶¶2-3. As these incidents occurred prior to October 1, 1992, 29 C.F.R. Part 1613 governs the question of whether Plaintiff Sato properly exhausted his administrative remedies.[2] Section 1613.214(a) provides, in pertinent part:

> (1) An agency shall require that a complaint be submitted in writing by the complainant or signed by the complainant... the agency may accept complaint for processing in accordance with this subpart only if:
> (i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe that he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and

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[2]The current regulatory provision governing Title VII complaints, 29 C.F.R. Part 1614, did not go into effect until October 1, 1992. 57 Fed. Reg. 12634 (1992).

> (ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days after the receipt of the notice of the right to file a complaint...
>
> (4) The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

29 C.F.R. § 1613.214(a) (1991) (emphases added).

A. The Department Of The Interior Did Not Err In Dismissing Sato's EEO Complaint For Failure To Comply With The Time Limits And In Not Extending Those Time Limits

The Department of the Interior (the "Department") dismissed Sato's complaint for failure to comply with the statutory time limits because he did not initiate contact with an EEO counselor until February 4, 1994, over two years after he had resigned in January 1992. September 19, 1996 letter from Melodee Stith, EEO Director for the Department ("Stith Letter"), attached as Exhibit Y to Plaintiffs' Opposition to Motion to Dismiss, at 2. Although the Ninth Circuit does not appear to have decided the issue of the proper standard of review to apply in cases such as this, it is clear that even under a *de novo*

standard, the Department did not err in dismissing Sato's EEO Complaint or in failing to extend the regulatory time limits for him.

Sato's EEO Complaint alleges that the date on which the most recent alleged discrimination occurred against him was October 1, 1991. *See* note 1. Sato did not file his EEO Complaint, however, until May 13, 1994. It is clear from the face of Sato's EEO Complaint that he did not meet the applicable statutory time requirements for filing a complaint contained in 29 C.F.R. § 1613.214 (a) (1991).[3] Nor did Sato provide the Department with any information whatsoever, either in the EEO Complaint or the Amendment attached thereto, indicating that he had neither received official notice nor possessed actual knowledge of the time limits for filing an EEO complaint. The Department, therefore, did not have any basis for extending the filing deadline for Sato pursuant to 29 C.F.R. §§ 1613.214(a)(4), 1614.105(a)(2) or 1614.604(c), and properly dismissed his EEO Complaint for failure to comply with the applicable time limits.

Accordingly, the Department did not err when it dismissed Sato's EEO Complaint for failure to properly exhaust his administrative remedies in a timely manner. Nor did the Department err when it did not extend the regulatory time limits with respect to Sato's EEO Complaint.

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[3]It is also clear that Sato's EEO Complaint did not meet the time limit requirements of 29 C.F.R. S 1614.105(a)(1), which were in effect at the time he filed the EEO Complaint.

B. Sato Failed To Satisfy The Regulatory Filing Time Limits And Is Not Entitled To Equitable Relief From This Court

Sato did file a Complaint with this Court prior to the Department's dismissal of his EEO Complaint. Sato was entitled to file such a complaint because the Department did not respond to his EEO Complaint within 180 days of the date of its filing. 29 C.F.R. § 1614.408(b). The Court, therefore, will make its own separate determination of whether Sato properly exhausted his administrative remedies or is entitled to equitable relief for any failure to do so.

"Title VII specifically requires a federal employee to exhaust his administrative remedies as a precondition to filing suit." *Vinieratos*, 939 F.2d at 767-768 (citing *Brown v. General Servs. Admin.*, 425 U.S. 820, 832 (1976)). The Ninth Circuit has "recognized that strict compliance with the filing period may be excused 'if the plaintiff had neither official notice nor actual knowledge of the filing period.'" *Thornhill v. Marsh*, 866 F.2d 1182, 1184 (9th Cir. 1989) (citation omitted). The Supreme Court has cautioned, however, that:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 . . . (1980), "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is

> the best guarantee of evenhanded administration of the law."

Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984).

Defendant bears the burden of pleading and proving Sato's failure to exhaust his administrative remedies in a timely manner because it is an affirmative defense. *Brown v. Marsh*, 777 F.2d 8, 13 (D.C. Cir. 1985). Once Defendant has met the burden of showing a failure to exhaust in a timely manner, the burden shifts to Sato to prove that he is entitled to equitable avoidance of the defense. 29 C.F.R. §§ 1613.214 (a) (1) , 1614.1 05 (a) (1) ; *Jarrel v. United States Postal Serv.*, 753 F.2d 1088, 1091-92 (D.C. Cir. 1985).

1. Defendant has shown that Sato failed to timely exhaust his administrative remedies

It is undisputed that Sato did not file his EEO Complaint until over two years after he resigned from the Park. As noted above in Section II A, Sato's EEO Complaint on its face fails to comply with the regulatory time requirements for filing such a complaint. Sato claims that he did meet the 30-day reporting requirement contained in § 1613.214 (a) (1) (i). Sato alleges that at two conferences he attended in the 1980s, he informed Becky Mills ("Mills"), the National Park Service's ("NPS") EEO Manager for the Western Region, that Puu was subjecting him to gross racial slurs on a regular basis, and that she responded that his situation was personal and did not mention the

possibility of filing an EEO Complaint or meeting with an EEO Counselor.[4]

Mills' resume and testimony at the Rule 43 (e) Hearing indicate that she has dedicated her career to affirmative action and fair employment issues. In addition to her participation in the civil rights movement in the 1960s, Mills has been employed in positions involving affirmative action or fair employment practices since 1969. When questioned about whether the statement contained in Sato's Affidavit at ¶ 9 and repeated above in note 4 was accurate, Mills testified as follows:

> I do not believe Mr. Sato was accurate. It is not possible for me to have heard that remark — to have heard that a supervisor would have used such racist language and not to have advised him of his right to seek a counselor or to have told him of my own concern about it...
> I would have talked to him about the complaint system. That discrimination was against the law. And I would have personally been quite offended by what he was telling me.

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[4]Sato alleges in his affidavit that: "[i]n the mid to late 1980s, I met Becky Mills at two orientations, one in San Francisco and the other in San Diego, California and found out that she was an Equal Employment Officer for the Western Region office. I told her that my supervisor, Mr. Puu, was calling me 'one stupid Jap' and 'fucking Jap' on a regular basis. I also told her that since I had started at Haleakala in 1978 I have only been assigned to sanitation duties despite the fact that I am qualified to do other work such as carpentry and masonry. Ms. Mills responded that my situation was personal. She did not inform me that I had the right to file an equal employment opportunity complaint or any other complaint for that matter." Sato Aff. at ¶ 9.

> I would also have said, though, as I counseled our staff and all of the other counselors in the park service, that we could not direct individuals to file complaints. It was not our business to do that. We could tell them and had to — we had an obligation to tell them about the system that was available. But it was not our job to take on the complaint for them.

Transcript of April 22, 1997 hearing at pp. 50, 52. The Court found Mills' testimony at the Rule 43(e) Hearing to be highly credible and sincere.

There are several problems with Sato's claims. Sato claimed in his affidavit that he met Mills at two orientations in the mid to late 1980s, one in San Francisco and one in San Diego. For the Rule 43(e) Hearing, Sato provided the schedules for two orientations he attended: an August 1982 Orientation to NPS Operations that does not indicate the location of the orientation, and an October 1985 Federal Women's Training Program at Hawaii Volcanoes National Park on the Big Island. Plaintiffs, Exhibits 1 & 2. Mills testified that she does not recall attending the 1982 orientation. She is not listed on the schedule of speakers for that orientation provided by Sato, see Plaintiff's Exhibit 1, nor is she listed on the list of orientation participants provided by Defendant. *See* Defendant's Exhibit 8. The 1982 NPS Orientation attended by Sato did have an hour and forty-five minute Equal Opportunity Program given by a separate EEO official. Plaintiff's Exhibit 1.

Mills did attend the 1985 Federal Women's Training Program on the Big Island and gave several lectures on EEO complaints. Mills

testified that the EEO presentations given by her and others at NPS orientations and training programs covered the EEO complaint process and EEO rights. Although Mills testified that she remembers meeting and speaking to Sato on more than one occasion, she could not recall the exact location and content of those conversations, other than that she recalls speaking to him about a back injury he sustained when she visited the Park in the late 1970s. She emphatically denied, however, the statement contained in Sato's affidavit concerning their conversations.

The evidence presented to this Court compels the conclusion that Sato was not correct in his recollection of his conversation with Mills as reflected in his affidavit and his testimony at the Rule 43(e) Hearing. The Court does not find that Sato's alleged conversation with Mills constituted the requisite reporting to an EEO counselor within 30 days of an alleged discriminatory event, as required by § 1613.214(a)(1)(i). The Court finds Mills testimony to be highly credible and is satisfied that had Sato brought his claims of racial discrimination to her, she would have discussed his rights with him and the EEO complaint process rather then stating that the matter was "personal" as Sato alleges. Defendant has clearly carried its burden of showing that Sato failed to exhaust his administrative remedies with respect to his Title VII claims in a timely manner.

2. Sato has not shown that he is deserving of equitable relief from this Court

Sato is eligible for equitable relief from the exhaustion requirement and the mandated time limits if he can show that there was no official notice given of the right to file a complaint and the

applicable time limits, and that he was not otherwise aware of these regulatory requirements. 29 C. F.R. § 1613.214 (a) (4) (1991); *Thornhill*, 866 F.2d at 1184. Sato has failed to make such a showing.

All of the evidence presented indicates that even if Sato were correct in his recollection that he did not receive actual notice of these rights and requirements, there certainly was ample official notice which should have made Sato aware of them. Sato served as the maintenance representative on the Park's EEO committee from approximately 1988 until sometime in 1991. Although Sato claims he only attended one meeting at which the right to file an EEO complaint was never discussed, his own witness, Susan Nikaido ("Nikaido"), stated in her sworn declaration and at the Rule 43(e) Hearing that the few times the EEO Committee did meet, Sato usually attended. The former head of the EEO Committee, Kim Sikoryak ("Sikoryak"), testified that Sato was not only present at more than one meeting, but that he also actively participated in discussions involving whether the Park should have official cultural activities recognizing different ethnic groups. A memorandum prepared by Sikoryak after an April 1990 meeting of the committee at which all members were present, states that the committee discussed the difference between EEO complaints and general grievance procedures.

Sato himself submitted the schedules for two separate orientations he attended in 1982 and 1985. The 1982 orientation included an Equal Opportunity Program, and the 1985 orientation had numerous programs on EEO issues, including two sessions conducted by Mills on "Case Studies & EEO Complaints." Plaintiffs' Exhibits 1 & 2. These documents submitted by Sato contradict his claims that he never received any information on employees' rights to file an EEO

Complaint, and the procedures associated therewith, until his discussion with Eric Nakamura in December 1993.

Witnesses for both parties testified that the Park headquarters' bulletin board had an EEO poster that, at the very least, contained pictures of the regional and Park EEO officers and counselors. Park Superintendent Don Reeser ("Reeser") testified that when he arrived at the Park in 1988, an EEO poster of the type contained in Exhibit 4 was posted on the Park headquarters' bulletin board, and that it did contain language stating that employees who had experienced discrimination should contact an EEO counselor within 30 days of the alleged discriminatory action. Reeser stated that an EEO poster of this type was posted until about 1992 or 1993, when the language was changed to 45 days to reflect the change in the regulations. Reeser also testified that information detailing the EEO Complaint procedures and 30 and 15 day time limits, of the type contained in Defense Exhibit 6, was posted adjacent to the EEO Poster.

Park Ranger Karen Ardoin ("Ardoin"), whose desk was located close to the bulletin board and who monitored that board to ensure that the EEO information was properly exhibited, gave testimony consistent with that of Reeser. Maintenance worker Jess Mercado testified that EEO information was posted not only on the headquarters bulletin board but also in the maintenance shop.

At least two of Plaintiff's witnesses offered testimony that the headquarters bulletin board contained an EEO poster while Sato was employed at the Park, but that the poster did not contain any information on time limitations. Nikaido testified that she never saw a time limitation on the EEO poster until after Sato left the Park, and

the parties stipulated that Nakamura would testify that the poster merely contained pictures of the EEO officers. Nikaido identified Defense Exhibit 4 has the type of poster she received from the regional office and posted from approximately 1985 to 1991, but on re-direct she reiterated that she does not recall seeing the 30-day language written on the bottom of the poster. The parties stipulated that two other maintenance workers, Wendell Sagon and David Texeira, would testify that no EEO posters were up at the Park during their tenure.

Sato admitted reviewing often the bulletin board at headquarters, yet claims that no EEO posters were posted. Despite Sato's recollections, the majority of the other witnesses, including Nikaido and Nakamura, indicated that the headquarters' bulletin board did contain an EEO poster. Although Sato's witnesses claimed that they do not recall seeing the 30-day time limitation language at the bottom of the EEO poster, Reeser, Ardoin and Mercado all remember seeing this language and the information sheet posted next to the poster. Moreover, Mills stated that the EEO Poster contained in Defense Exhibit 4 was the standard poster that would have been sent to the Park during Sato's tenure, and that merely the pictures of the Regional EEO staff would change. She testified that at least five different printings of the EEO poster of the type contained in Exhibit 4 were made and sent to the Park from 1981 to 1990. There was no evidence presented that posters not containing the 30-day language were sent out during this time period.

The Court finds that given all of the evidence presented, including Sato's service on the EEO Committee, his attendance at the 1982 NPS Orientation and the 1985 Federal Women's Training Program, and the posters and information posted at the Park, that Sato

did have official, if not actual, notice of his right to file an EEO complaint of discrimination and the applicable time limits connected therewith. Sato has failed to convince the Court that he is deserving of equitable relief for his failure to properly exhaust his administrative remedies, and his claims against Defendant must be dismissed. *See Scholar v. Pacific Bell*, 963 F.2d 264 (9th Cir.), *cert. denied*, 506 U.S. 868 (1992).

In so holding, the Court reiterates that it is not making any determination here on the merits of Sato's claims of racial discrimination and is in no way excusing or ignoring any racial harassment that he may have endured during his tenure at the Park. The Court simply holds that any racial discrimination Sato may have experienced was not brought to Defendant's attention in a timely manner as required by the regulations, Sato has not shown that he is deserving of equitable relief for this failure, and the Court is not allowed to ignore the required administrative procedures regardless of the severity of the alleged conduct. *Baldwin County Welcome Ctr.*, 466 U.S. at 152. The Supreme Court has indicated that "[f]ederal courts have typically extended equitable relief only sparingly." *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990). Sato's failure to pursue his Title VII claims in a diligent manner while he was employed at the Park precludes his untimely assertion of these claims here. *Id.*

CONCLUSION

In accordance with the foregoing, the Court HEREBY DISMISSES Plaintiff Ronald Sato's claims against Defendant for failure to exhaust administrative remedies in a timely manner.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
OCT 13 1999
OFFICE OF THE CLERK

No. 99-265

In the Supreme Court of the United States

ERIC NAKAMURA, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
MARLEIGH D. DOVER
EDWARD HIMMELFARB
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a district court may hold a hearing pursuant to Federal Rule of Civil Procedure 43(e), to resolve a quasi-jurisdictional issue involving a factual dispute that would be tried by the court.

2. Whether a plaintiff alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, must first file an appeal with the Equal Employment Opportunity Commission from an agency's resolution of his administrative complaint.

3. Whether the law of the case doctrine prevents a district court from dismissing a claim brought under Title VII after trial because the plaintiff failed to include it in his administrative complaint, when the court had denied a pretrial motion to dismiss on the same ground.

4. Whether a district court may grant judgment as a matter of law in favor of an employer on a plaintiff's Title VII claim when the plaintiff introduces no evidence at trial to refute the employer's nondiscriminatory reason for its action or, in the alternative, when the plaintiff establishes pretext but fails to present evidence of retaliatory intent.

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In the Supreme Court of the United States

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BRUCE BABBITT, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A129-A133) is unpublished, but the judgment is noted at 165 F.3d 916 (Table). The orders of the district court (Pet. App. A6-A19, A20-A48, A49-A116, A152-A169) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A118) was entered on December 23, 1998. A petition for rehearing was denied on March 11, 1999. The petition for a writ of certiorari was filed on June 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1995, petitioners Ronald Sato and Eric Nakamura, former employees of the Maintenance Division of Haleakala National Park (the Park), brought suit against the Department of the Interior. Pet. App. A6. The National Park Service (the agency), an agency within the Department of the Interior, operates the Park. Petitioners alleged racial discrimination by various Park employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. A6.[1]

Sato worked at the Park as a full time maintenance worker from January 1978 to January 1992, when he resigned. Pet. App. A14. He filed a complaint in this case which alleged that his supervisor, David Puu, subjected him to racial epithets, permanently assigned him to sanitation duties and gave him negative referrals when he sought to transfer to other positions, on account of his Japanese ancestry, in violation of Title VII. *Ibid.* Sato claimed that he informed an Equal Employment Opportunity officer of Puu's harassment in the late 1980s and that he was not told and did not know that he had a right to file an Equal Employment Opportunity complaint with the agency. *Id.* at A15-A16. Two years after he resigned, Sato filed an informal complaint, which the agency dismissed for failure to comply with the statutory time limits. *Id.* at A30-A31.

Nakamura worked at the Park as a temporary maintenance worker from 1989 until September 1994, when he was terminated, allegedly because the Park could no longer fund his position. Pet. App. A53-A54.

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[1] The order denying defendant's motion for summary judgment is reproduced twice in the appendix (Pet. App. A6-A19, A138-A151). References in this brief are cited to Pet. App. A6-A19 only.

Nakamura filed a complaint alleging, inter alia, that his co-workers retaliated against him and that he was ultimately terminated in violation of Title VII, on account of his involvement in a 1993 investigation of David Puu's alleged racial discrimination in supervising Park employees, which led to Puu's removal from his supervisory position. *Id.* at A22-A23, A36-A37. Nakamura's Title VII claim included allegations of co-worker and supervisor retaliatory harassment from April to September 1993 and March to September 1994, and retaliatory termination in September 1994. *Id.* at A26, A31-A32. Both before and after termination, Nakamura filed a number of administrative complaints with the agency, alleging retaliatory treatment by his co-workers and supervisors. His complaints did not allege retaliatory termination. *Id.* at A73, A74, A78-A79. On February 14, 1994, Nakamura and the agency entered into an informal resolution agreement concerning an informal complaint he had filed in November 1993. The agreement resolved his claims of retaliatory treatment between April and September 1993 and, among other things, reinstated 153 hours of his annual leave.[2] *Id.* at A39-A40.

2. a. On September 10, 1996,[3] the district court denied the agency's motion for summary judgment dismissing petitioners' Title VII claims. Pet. App. A2. The court denied summary judgment for Sato's alleged

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[2] On April 11, 1994, Nakamura and the agency entered into another informal resolution agreement concerning an informal complaint he had filed in February 1994, alleging retaliation in January and February of that year. Pet. App. A52-A53.

[3] Petitioners indicate that the date of the district court's decision is September 19, 1996 (Pet. App. A6). The correct date of the decision is September 10, 1996.

failure to exhaust administrative remedies, as required by 29 C.F.R. 1613.214(a)(1)(i) (1991), because it found a genuine issue of fact as to Sato's compliance with the regulation. Sato alleged that he told an Equal Employment Opportunity counselor about Puu's harassment in the 1980s, when it occurred on a regular basis, thereby fulfilling the regulation's notice requirement. Pet. App. A15-A16. The court also denied summary judgment dismissing Nakamura's Title VII claims in their entirety. It found that he had established a prima facie case of retaliation at least with respect to an allegation of harassment that allegedly took place after April 11, 1994, that the allegation was not resolved by any agreement Nakamura had made with the agency and that Nakamura had exhausted his administrative remedies with respect to it. *Id.* at A10-A14.

b. On February 20, 1997, the district court denied the agency's motion to dismiss Sato's claims for failure to exhaust—a motion on the same grounds as the agency's earlier motion for summary judgment—but converted that motion to one for summary judgment. Pet. App. A27. It then denied the motion due to the existence of disputed issues of fact and agreed to hold a hearing pursuant to Federal Rule of Civil Procedure 43(e) to resolve those issues.[4] Pet. App. A34-A35, A154. The court granted summary judgment dismissing Nakamura's claim that his co-workers retaliated against him from April to September 1993, for his role in the investigation and removal of Puu, finding that the claim was barred by the February 1994 informal resolution agreement between Nakamura and the

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[4] The court denied the agency's motions for hearings pursuant to Rule 43(e) to resolve several other issues raised by the agency. Pet. App. A27.

agency. *Id.* at A45. The court rejected on four independent grounds Nakamura's argument that he was entitled to revive his claim because the agency materially breached that agreement by failing to timely reinstate his annual leave. First, the court held that the agency did not breach because it restored his leave promptly upon learning of the oversight. Second, even if the agency did breach, Nakamura failed to exhaust his administrative remedies with respect to his claim because he failed to file his complaint with the agency within 30 days after learning of the breach, as 29 C.F.R. 1614.504 requires. Third, even if his delayed filing could be excused, he did not fulfill the remaining requirements of that regulation by filing a complaint with the Washington office of the National Park Service; and fourth, he failed to file a written appeal with the Equal Employment Opportunity Commission from the agency's resolution of his complaint under 29 C.F.R. 1614.504(b). Pet. App. A41-A44.

The court denied the agency's motion for summary judgment dismissing Nakamura's retaliatory termination claim for failure to raise that claim with the agency.[5] The court held that it could hear the claim because it was reasonably related to the allegations of adverse retaliatory action that Nakamura did raise in his administrative complaints. Pet. App. A45-A46.

c. The district court held an evidentiary hearing pursuant to Rule 43(e) on April 22 and May 28, 1997, to determine whether Sato failed to exhaust his administrative remedies. The Rule permits a court to hear a motion wholly or partly by oral testimony or deposition,

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[5] The court also resolved a number of other motions brought by the agency which are not relevant to the issues raised in this appeal.

as well as affidavits, when the motion is "based on facts not appearing of record." Fed. R. Civ. P. 43(e). The court explained that it was not deciding a summary judgment motion; it had previously denied the agency's motion for summary judgment on the exhaustion issue. Pet. App. A154. The court stated that an evidentiary hearing could be used to resolve that issue, because, though not "jurisdictional * * * per se," it was a legal issue for the court to decide, distinct from the merits of Sato's claims. *Id.* at A153. It also noted that because most, if not all, of Sato's claims concerned discrimination that occurred before the 1991 amendments to Title VII, which provide for trial by jury, 42 U.S.C. 1981a(c), his claims did not qualify for jury trial in any event. Pet. App. A156 n.1. On June 2, 1997, the court dismissed Sato's claims for failure to exhaust, primarily because it found Sato's claim that he had discussed Puu's discrimination with an Equal Employment Opportunity counselor in the 1980s to be incorrect, after hearing the counselor's testimony. *Id.* at A152, A163-A164.

3. Nakamura's remaining allegations of co-worker and supervisor retaliation from March to September 1994 and retaliatory termination in September 1994 were tried to a jury, which found in favor of the agency on the retaliation claim but in favor of Nakamura on the termination claim. The jury awarded him $30,000 in compensatory damages. Pet. App. A50-A51.

a. On October 31, 1997,[6] however, the district court granted the agency's motion to dismiss the retaliatory termination claim for lack of jurisdiction pursuant to

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[6] Petitioners indicate that the date of the district court's decision is October 30, 1997 (Pet. App. A49). The decision was signed on that date but filed on October 31, 1997.

Federal Rule of Civil Procedure 12(h)(3), because Nakamura failed to raise his retaliatory termination claim with the agency. It reconsidered its earlier decision denying dismissal of that claim and concluded the claim was insufficiently related to the claims Nakamura had raised in his administrative complaints. As a result, the court held that it lacked jurisdiction over the claim because Nakamura had not presented it to the agency. Pet. App. A59.

b. In the alternative, the district court held that the agency was entitled to judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, on the retaliatory termination claim. Pet. App. A68 n.6. The court found that although Nakamura had established a prima facie case of discrimination, the agency had produced evidence supporting its claim that Nakamura was terminated for budgetary reasons and his own inability to work—legitimate, nondiscriminatory justifications. *Id.* at A71-A72. After carefully analyzing the evidence, the court held that Nakamura had failed to provide specific substantial evidence that the agency's stated reasons were a pretext for discrimination. *Id.* at A73. The court noted that Nakamura produced only one witness in support of his pretext claim, who lacked specific knowledge of the relevant budgetary decisions. *Id.* at A93-A94. The court therefore determined that the evidence permitted only one reasonable conclusion: that the agency had not discriminated against Nakamura. It therefore granted judgment as a matter of law to the agency.

c. In the alternative, the court stated that even if Nakamura had presented sufficient evidence of pretext, he still failed to sustain his ultimate burden with respect to retaliatory termination. The court noted that Nakamura's minimal prima facie case, "coupled

with what would have been, at best, an extremely questionable finding of pretext * * *," would have been insufficient to support a finding of retaliatory termination. Pet. App. A100. The court analyzed the evidence regarding retaliatory intent, *id.* at A100-A110, and concluded that Nakamura had "produced no evidence at trial from which a jury could have reasonably concluded that he was terminated as a result of unlawful retaliation rather than [the agency's] stated budgetary reason." *Id.* at A109.

4. The court of appeals affirmed in an unpublished opinion on December 23, 1998. Pet. App. A1-A5. It affirmed the decision to hold a hearing pursuant to Rule 43(e), stating that Sato had no right to a jury trial on the exhaustion issue. It upheld the dismissal of Nakamura's 1993 retaliation claims, for failure to provide notice of noncompliance to the agency within thirty days as required by regulation and because breach of the agreement was not material. It also upheld the post-trial dismissal of the retaliatory termination claim and upheld the grant of judgment as a matter of law, agreeing that Nakamura had failed to produce sufficient evidence of pretext. *Id.* at A2-A4. It denied rehearing and the suggestion for rehearing en banc on March 11, 1999.

DISCUSSION

The petition presents no significant issue warranting this Court's review. Two of the claims raised by petitioners simply challenge alternative holdings, and therefore could not affect the judgment, which rests on independent grounds. In any event, the decision of the court of appeals is correct, and there is no conflict among the circuits on the issues raised in this case. Accordingly, review should be denied.

1. Petitioners claim that the district court erred in conducting a hearing pursuant to Rule 43(e) to resolve disputed issues of fact in order to determine whether Sato exhausted his administrative remedies, Pet 13-15, and that there is a conflict among the circuits on this issue.[7] Neither claim is correct. It is not disputed that a hearing pursuant to Rule 43(e) is appropriate to resolve jurisdictional and related motions. See generally 9 Charles Alan Wright et al., *Federal Practice and Procedure* § 2416 (2d ed. 1995); see also *Spivey* v. *United States*, 912 F.2d 80, 84 (4th Cir. 1990); *Ritza* v. *International Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 369 (9th Cir. 1988); *Stewart* v. *RCA Corp.*, 790 F.2d 624, 628 (7th Cir. 1986). The exhaustion issue that was referred to a hearing in this case is a quasi-jurisdictional issue. See *Champagne* v. *Schlesinger*, 506 F.2d 979, 982 (7th Cir. 1974).

Ritza held that jurisdictional motions or related motions, including a motion to dismiss for failure to exhaust administrative remedies, are governed by the general motion provisions in the federal rules, "including Rule 43(e)." See *Ritza*, 837 F.2d at 369. In an effort to establish that *Ritza* conflicts with the decisions of other circuits on this issue, petitioners refer to several cases; however, none are to the contrary. *Bayer* v. *United States Department of the Treasury*, 956 F.2d 330 (D.C. Cir. 1992), does not interpret or otherwise mention Rule 43(e). *Spivey* affirmed that the Rule is generally "used to resolve preliminary issues in connec-

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[7] The petition refers both to the "timeliness" of a discrimination complaint and to the "exhaustion of administrative remedies." Pet. 13. The issue in this case is exhaustion; the agency did not allege that Sato's discrimination complaint was untimely filed with the district court.

tion with jurisdictional or related types of motions." *Spivey*, 912 F.2d at 84. Pet. 13.

Stewart, like *Spivey*, held that a hearing pursuant to Rule 43(e) can be held to resolve a number of motions that are decided by the court alone, including a motion to dismiss for lack of jurisdiction. See *Stewart*, 790 F.2d at 628. While *Stewart* states that a court should not "receive and weigh oral and written evidence" and resolve factual disputes pursuant to Rule 43(e), the court's concern was not "that the judge called a hearing," but that he resolved "a factual dispute on a motion for summary judgment." *Stewart*, 790 F.2d at 628, 629. Thus, the reservations expressed in *Stewart* are irrelevant to this case. The district court denied the agency's motion for summary judgment; it did not hold a hearing pursuant to Rule 43(e) to resolve it. Pet. App. A153. Even if the district court had done so, where, as here, the judge is to be the fact-finder of the case as a whole (Pet. App. A156 n.1), the court can hold a hearing to resolve a factual dispute, even on summary judgment. *Stewart*, 790 F.2d at 629.

2. Petitioners argue that the district court erred in dismissing Nakamura's claims of retaliation by supervisors and co-workers from April to September 1993 because Nakamura failed to file a written appeal with the Equal Employment Opportunity Commission. Pet. 16-17. Even if the district court erred in implying that a written appeal is required, cf. *Saksenasingh* v. *Secretary of Education*, 126 F.3d 347, 351 (D.C. Cir. 1997), further review is unwarranted, for it can give petitioners no relief. The district court's challenged holding was the fourth independent basis for its decision to dismiss the 1993 retaliation claims. Nakamura does not challenge the three alternative holdings: that those claims were settled by an agreement on February

14, 1994, that the agency did not breach; that if the agency had breached, Nakamura failed to exhaust his administrative remedies because he did not file his complaint within 30 days after learning of the breach, as 29 C.F.R. 1614.504 requires; and that if that requirement could be excused, he did not pursue the regulation's additional requirements by filing a complaint with the Washington office of the National Park Service. Pet. App. A41-A44. Thus, even if the fourth basis was mistaken, review of petitioners' claim is not warranted.

3. Petitioners challenge the district court's dismissal of Nakamura's retaliatory termination claim (following a jury verdict in his favor), for lack of jurisdiction pursuant to Rule 12(h)(3), because Nakamura failed to present that claim to the agency, and thus failed to exhaust his administrative remedies. Prior to trial, the district court had denied the agency's motion for summary judgment dismissing Nakamura's retaliatory termination claim on the same grounds. Petitioners contend that the dismissal conflicts with the Ninth Circuit's holding in *Sosa* v. *Hiraoka*, 920 F.2d 1451 (1990), and that it is barred by the "law of the case" doctrine. Pet. 16-18. Neither contention warrants review and neither is correct.

The district court properly applied *Sosa*. It inquired whether an agency investigation of Nakamura's administrative complaints could reasonably have been expected to encompass the additional claim of retalitory termination made in the court complaint. See Pet. App. A60-A62; *Sosa*, 920 F.2d at 1456. Based on the evidence presented prior to and during trial, the court concluded that an agency investigation could not have been expected to reach that additional claim, given the nature of Nakamura's administrative complaints. Pet.

App. A62-A63. This narrow, fact-bound holding does not warrant this Court's review.

The "law of the case" doctrine does not bar the district court's conclusion. As petitioners acknowledge, courts may change their own prior rulings at their discretion (Pet. 16) unless a party is prejudiced by his reliance on the prior ruling. See *Williams* v. *Runyon*, 130 F.3d 568, 573 (3d Cir. 1997). While prejudice may occur when a litigant alters his trial strategy in reliance on the prior ruling and is thereby deprived of an opportunity to present evidence on the issue in question to the jury (see *ibid.*), Nakamura could not have suffered such prejudice. He had no evidence that he had exhausted his administrative remedies with respect to his retaliatory termination claim; he argued to the district court that he was not required to do so, due to the similarity of the claims he raised in his administrative complaints. Pet. App. A59-A60. Even if the district court erred in granting the agency's motion to dismiss pursuant to Rule 12(h)(3), the court also found, in the alternative, that the agency was entitled to judgment as a matter of law pursuant to Rule 50, on that claim. *Id.* at A68 n.6.

4. Petitioners also claim that the district court erred in granting the agency's motion for judgment as a matter of law because Nakamura failed to show that the agency's legitimate, nondiscriminatory reason for terminating him was a pretext for discrimination. They argue that a reasonable jury could have found retaliatory termination and pretext. Pet. 18-20. Petitioners also claim there exists a conflict among the circuits as to the consequence of a showing of pretext. Pet. 22. Neither argument is correct, and neither justifies further review.

The district court's holding that Nakamura failed to show pretext is based on the specific facts of this case

and has no implication beyond them. The court did not simply substitute its judgment for the jury's, as petitioners imply. Pet. 18-19. It explicitly stated that it could not "assess the credibility of witnesses, resolve conflicting evidence, or otherwise substitute its conclusions for that of the jury." Pet. App. A74. It carefully analyzed the evidence, *id.* at A77-A111, and concluded that it permitted only one reasonable conclusion when viewed most favorably to Nakamura—that Nakamura failed to produce specific, substantial evidence that the agency's legitimate, nondiscriminatory, budgetary justification for terminating him was a pretext for discrimination. *Id.* at A98-A99. Judgment as a matter of law was therefore appropriate.

After finding that Nakamura had failed to present sufficient evidence of pretext, the district court noted that even if he had shown pretext, in addition to his prima facie case, he "still failed to sustain his ultimate burden of proving intentional discrimination with respect to his termination [and] * * * failed to present any evidence of retaliatory intent on the part of [the agency] in terminating [him]," thereby entitling the agency to judgment as a matter of law. Pet. App. A100.

Petitioners assert that the district court's approach to the implications of a showing of pretext conflicts with that of the Third and Sixth Circuits. See Pet. 22. In those circuits, once a plaintiff has established a prima facie case and pretext, he may survive judgment as a matter of law, because "a jury is permitted, [though] not required, * * * to conclude that there was intentional discrimination." *Sheridan* v. *E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-1067 (3rd Cir. 1996), cert. denied, 521 U.S. 1129 (1997); *Kline* v. *Tennessee Valley Auth.*, 128 F.3d 337, 352 (6th Cir. 1997) (cited by petitioner). The holding below is not to the

contrary, however, because the court of appeals held that as Nakamura never established pretext, judgment as a matter of law was correct. Pet. App. A4. There is no conflict among the circuits on this issue and this decision does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
MARLEIGH D. DOVER
EDWARD HIMMELFARB
Attorneys

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